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**In Defense of Voting—Reinterpreting the Terms of the Voting Calculus  
with a View toward Election Law and Policy**

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**by**

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“[T]he genius of the United States is not best or most in its executives or legislatures, nor in its ambassadors or inventors . . . but always most in the common people. Their manners speech dress friendships—the freshness and candor of their physiognomy—the picturesque looseness of their carriage . . . their deathless attachment to freedom—their aversion to anything indecorous or soft or mean—the practical acknowledgment of the citizens of one state by the citizens of all other states—the fierceness of their roused resentment—their curiosity and welcome of novelty—their self-esteem and wonderful sympathy—their susceptibility to a slight—the air they have of persons who never knew how it felt to stand in the presence of superiors—the fluency of their speech—their delight in music, the sure symptom of manly tenderness and native elegance of soul . . . their good temper and openhandedness—the terrible significance of their elections—the President’s taking off his hat to them not they to him—these too are unrhymed poetry.”

—Walt Whitman, Introduction to *Leaves of Grass*

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# **In Defense of Voting—Reinterpreting the Terms of the Voting Calculus with a View toward Election Law and Policy**

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Democratic voting is desperately in need of defense. Contemporary institutions of mass electoral participation are undertheorized, and there is a critical disconnect between conceptions of voting in democratic theory and election laws and policies that implicate participatory values and interests. This dissertation fills some of these gaps between the theories and practices of modern democracy by examining the factors that motivate individual decisions to vote or abstain and the electoral institutions that structure and respond to such decisions. With a primary focus on elections in the United States, this work explores how normative conceptions of voting not only influence individual participation decisions, but also provide foundations for electoral rules and procedures that impact turnout levels, both in the aggregate and for distinct demographic groups. As an analytical framework, the rational choice calculus of voting is utilized to parse the varied motivations for turnout, with the four elements of the calculus providing the outline for the four main chapters of the dissertation. The voting calculus has often been interpreted in ways that minimize the value of voting and provide reasons that explain why individuals do not—and perhaps even should not—participate in elections. This dissertation critically examines those views, and it reinterprets the terms of the calculus in a manner that demonstrates how the act of voting can in fact be highly valued, which explains why individuals do—and indeed generally should—participate in democratic elections. The analysis proceeds by first redefining the expected probability of one vote having a casual effect on an election outcome (Chapter 1), then by reevaluating the normative significance of the instrumental benefits of voting (Chapter 2) and the various types of voting costs (Chapter 3), and finally by reconsidering the theoretical and practical implications of non-instrumental motivations for participation, especially the notion of a civic duty to vote (Chapter 4). Each chapter further derives policy, legal, and broader ethical implications associated with these new interpretations of the terms of the calculus and makes specific reform proposals designed to increase participation in American elections at federal, state, and local levels.

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## **Introduction**

### **1) MOTIVATION: IN DEFENSE OF VOTING**

Why does voting need a defense? And how can reinterpreting the terms of the voting calculus with a view toward election law and policy help to provide this defense? Perhaps the title of this dissertation itself needs a defense, or at least an explanation. The title is admittedly more descriptive than evocative, although it might have been even more descriptively accurate had the initial title read: “In Defense of Mass Electoral Participation in a Liberal Representative Democracy.” There are indeed many reasons why the institutions and practices of voting in modern democracies—and particularly in the United States—are in need of defense, desperately some might say. Democracy itself seems currently to be undergoing a period of grave crisis—not just in this country, but all around the world, and widespread skepticism regarding the value of participating in elections is a significant part of the problem. The current crisis of democracy has deep historical roots, but the general loss of faith in electoral institutions seems particularly profound and prevalent more recently.

Unfortunately, academic scholarship has probably not helped much with this situation; in fact, it may have contributed to the current crisis in no small part. While electoral institutions in this country and elsewhere have been widely scrutinized for empirical effects on voting behavior and political outcomes, there has been far less attention to how normative assumptions about the meaning and purpose of democracy undergird its implementation in particular legal and administrative contexts. More problematically, as discussed throughout this dissertation, both theoretical and empirical research on democracy and elections have given reasons for fundamental skepticism regarding the value of voting: Rational choice scholarship has led to the general claim

that participating in any large election is essentially useless from an individual perspective, and even if one's participation were thought to matter somehow to the outcome, participatory theorists have generally maintained that the ability simply to choose one's political representatives is not a meaningful form of democratic engagement. Empirical political scientists have further asserted evidence claiming to show that democratic citizens generally lack the minimum levels of political knowledge needed to vote in a competent manner, and relatedly, many political theorists have expressed reservations about whether mass participation, in the form of high voter turnout, is something that is necessary—or even necessarily something that is good—for effective democratic governance.

At the same time, there is an ongoing partisan political battle raging around the rules and procedures for voting in American elections. This is accompanied by a general consensus among election law scholars that Supreme Court jurisprudence in this area is missing basic theoretical foundations needed to make fair and principled decisions on these matters. However, legal research seems thus far to have failed to fill these gaps between theory and practice adequately, especially with respect to clarifying the normative foundations for the value of voting to individual citizens. Institutions of mass participation in general remain undertheorized, and there is a particularly critical disconnect between conceptions of the role of voting in democratic theory and election laws and policies that implicate the individual-level interest in participation. These missing links are particularly problematic in the American context, given a system of highly decentralized administration substantially controlled by partisan officials, and the current antagonisms of polarized politics extending into the realm of election law and policy. Making progress in ongoing disputes over election administration and voting rights will require expanding the conversation about basic democratic norms. In short,

there is an urgent need—not just in the academy, but also in the courts, and in the general public discourse—for increased attention to the normative foundations of electoral institutions.

There has of course been a great deal of research into the causes and effects of variation in voter participation—whether at the country, group, or individual level; however, there has been relatively little attention to how conceptions of democratic theory may contribute and respond to this variation. This might be because the general question of how much participation is desirable from a normative standpoint is essentially unanswered, and in fact remains a matter of fundamental debate. As discussed throughout this dissertation, this basic theoretical question has enormous implications for election law and policy, as well as broader relevance for the conditions of citizenship in a modern democracy. The defense of voting in this work is thus also intended to lay the groundwork for a more supportive view of the value of mass participation in elections, and thereby to provide a stronger foundation for law and policy reforms aimed at increasing and equalizing voter turnout. To be clear, this research is motivated in large part by a perceived problem of low and unequal participation in American elections at the national, state, and local levels. It is particularly concerned with how patterns of socioeconomic inequality may be reproduced in the political sphere by electoral institutions that structure voting in ways that contribute to unequal participation among different demographic groups. Addressing the missing links between the theories and practices of elections may thus be crucial to preventing the perpetuation of social and political inequities in the United States and elsewhere.

For reasons discussed in the methodology section below, public policy research should be well placed to help better fill some of these gaps between the theories and practices of democracy. This dissertation seeks to advance that agenda through a broad

policy-oriented analysis of varying theoretical perspectives on the meaning and purpose of participating in elections, and of the implications of these varying perspectives, both for individual voters and for electoral institutions. More specifically, this work focuses on the motivating factors of voter turnout in order to demonstrate how normative conceptions of voting not only influence participation decisions at the individual level, but also provide foundations for election laws and policies that influence participation levels, both in the aggregate and for groups of potential voters.

## **2) ANALYTICAL FRAMEWORK: REINTERPRETING THE TERMS OF THE VOTING CALCULUS**

This work's defense of voting and its effort at bridging the gap between the theories and practices of democratic elections is framed by the rational choice calculus of voting, which formalizes the individual-level decision of whether to vote or abstain in a particular election as follows:

$$pB - C + D$$

The terms of the calculus—the variables  $p$ ,  $B$ ,  $C$ , and  $D$ —yield a four-fold classification of individual-level motivations for the turnout decision, which respectively are as follows: 1) the probability of an individual's vote having a causal effect on the outcome of the election; 2) the expected instrumental benefit derived from an individual's preferred candidate or choice prevailing; 3) the costs of voting, both substantively and in terms of information; and 4) any expressive or otherwise non-instrumental motivation for participating, including a perceived civic duty to vote. The formula of the calculus represents the following decision process by any prospective voter: First one multiplies the perceived probability of having a causal effect on the outcome by the expectation of benefit from one's preference prevailing ( $p*B$ , or just  $pB$ ), then one subtracts the costs of

voting (*C*), and adds the perceived utility of any non-instrumental benefit from participating, such as fulfilling the duty to vote (*D*). If the result is positive, the individual decides to vote, while if negative, the individual abstains. The four elemental terms of the calculus provide the outline for the four main chapters of the dissertation.

Although the voting calculus originates in the economics-based school of rational choice, the calculus itself can be seen as just a generic model of the voting decision. In this work, the calculus is not being utilized as the empirical model it was originally intended to be, but rather is employed simply as an analytical framework to parse the potential motivations for voting. Moreover, the use of the calculus here is not intended to provide support for rational choice as a broadly explanatory or predictive theory of political behavior, at least not in its conventional form, although this work does engage an expansive notion of rationality as goal-oriented choice that can include ethical or otherwise non-utilitarian motives. There is also no assumption here that individuals actually proceed explicitly through the decisional logic of the calculus, but the terms of the calculus are assumed to represent, at least abstractly, all relevant considerations in the decision of whether to vote or abstain.

As indicated above, and as discussed throughout this dissertation, the scholarly literature on democracy and elections has tended in many ways to devalue the act of voting. The terms of the calculus have thus often been interpreted in ways meant to explain—and to argue—why individuals *do not*—and why they *should not*—participate in elections. There are at least four ways in which this interpretative devaluation has taken place, which parallel the four elements of the voting calculus, as follows: 1) Scholars have concluded, almost universally, that the individual act of voting in a large election is basically pointless, since one vote is incredibly unlikely to have a causal effect on the outcome. 2) Many theorists have suggested that the instrumental benefits of voting

under current systems of representative democracy are essentially worthless, since choices between candidates are often effectively meaningless, and because voting is a weak and ineffectual form of participation in general. 3) Scholars have generally assumed that the informational costs of voting are relatively high, or even prohibitively high with respect to many—if not most—citizens, given a presumption that substantial political knowledge is needed to cast a minimally competent vote. 4) Scholars have argued that non-instrumental motivations for voting are normatively problematic, and more generally that voting should not be conceived as a universal duty incumbent on all citizens of a democracy, but is rather best left as a purely voluntary choice to be undertaken only by those who are sufficiently—and perhaps properly—motivated to participate.

This dissertation critically examines these views and takes the opposite tack, reinterpreting the terms of the calculus in a manner meant to explain—and to argue—how the individual act of voting can in fact be highly valuable, and thus why individuals *do*—and indeed generally *should*— participate in elections. This work thus provides new perspectives on the motivations for voting, first by redefining the probability of an individual vote having a causal effect on an election outcome, then by reevaluating the normative significance of both instrumental benefits and the various types of voting costs, and finally by exploring the theoretical and practical implications of non-instrumental motivations, particularly the idea of a civic duty to vote. The four main chapters of the dissertation thus argue and explain as follows: 1) An individual vote can have a high degree of causal efficacy even in the largest of mass elections. 2) The expected benefit of having one's preferred candidate prevail in contemporary elections may reasonably be perceived as extremely high. 3) Informed voting for representatives in a liberal democracy is not and should not be viewed as prohibitively costly. 4) Electoral participation should be institutionalized, and possibly enforced in some manner, as a



constitutional civic duty. Each chapter further derives policy, legal, and broader ethical implications associated with these new interpretations of the terms of the calculus, and then makes specific proposals for election law and policy reform in the United States.

Chapter 1 begins with  $p$  in the calculus and the so-called paradox of voter turnout, which assumes that participating in a large election can never be instrumentally rational from an individual perspective, given the infinitesimally small probability that one vote will ever have a causal effect on the outcome. This chapter critiques that mostly unquestioned assumption, and it develops a new formal model of the value of  $p$  that draws on the innovative approach of Richard Tuck in his book, *Free Riding* (2008). In this model, if an election is expected to be highly competitive, the prospective probability of any one vote having a causal effect on the outcome is essentially equal to one—not zero as generally assumed. The chapter then discusses how this new approach to the instrumental rationality of voting could have important consequences for election law and policy in areas of voting rights and partisan gerrymandering, as well as broader normative implications for the understanding of collective action problems in general.

Chapter 2 considers the instrumental benefits of voting represented by  $B$  in the calculus, formally defined as the expected utility differential between candidates on the ballot. Transcending the alleged paradox of voting, this chapter interrogates prevailing assumptions about a lack of meaningful instrumental value in voting, and it suggests a new interpretive focus that yields insights into how and why instrumental motivations lead individuals to vote or abstain in particular elections. The analysis proceeds by distinguishing three typical attitudes that diminish the perceived value of  $B$  in the calculus: indifference, alienation, and ambivalence. Indifference is most commonly associated simply with lack of information, and some basic policy reforms are suggested to reduce indifference-based abstention by providing additional information on the ballot,

particularly in state and local elections where it is most needed. Alienation presents a more difficult normative problem, analysis of which leads to discussion of the rationality and ethics of voting for a lesser evil, and the possibility of an instrumentally-based duty to vote even under conditions of extreme alienation. The chapter then explores the problems of ambivalence in the face of conflicting political ideals or motivations, and it evaluates the difficult ethical dilemmas that can arise when elections pose particularly hard choices, whether between perceived goods, perceived evils, or between instrumental motivations to vote and expressive reasons to abstain. The chapter concludes with a brief discussion of democratic theory as it relates to the instrumental benefits of voting under contemporary political conditions.

Chapter 3 discusses the *C* term representing the costs of voting, which are divided into two primary categories: substantive costs and information costs. While substantive costs—which involve the administrative and logistical burdens on casting a ballot—are observed to vary widely, information costs implicate long-running normative debates about whether mass electorates have the knowledge and reasoning abilities deemed necessary for democratic competence. This chapter delves into foundational issues of democratic theory by comparing the informational requirements of voting under two broadly opposing approaches, drawing on William Riker’s seminal distinction in *Liberalism Against Populism*. The populist interpretation of voting, which relies on a strong epistemic assumption of independent standards of correctness, is associated with deliberative theory and its skepticism about mass participation in a representative democracy. As an alternative, Riker’s liberalism is elaborated into a unified theory that incorporates the value of participation within a broader framework of competitive democracy. Mass electoral competence is thus demonstrated to be viable through a more procedural political epistemology and a value-based approach to representation, under

which the costs of voting in a minimally informed manner are more widely affordable. The chapter then discusses implications of this theoretical approach for constitutional design and election law jurisprudence, and for policy reform proposals that aim to increase participation by minimizing the substantive costs of voting.

Finally, Chapter 4 on the *D* term of the calculus considers the question of whether electoral participation should be treated—and perhaps institutionalized—as a general obligation of all adult citizens in a liberal democracy, or whether it is best left as a purely voluntary choice. The chapter first discusses the nature of non-instrumental benefits in general, and it reviews specific implementations of the constitutional duty to vote and compulsory voting laws in democracies around the world. The chapter then proceeds to outline a normative argument—based on Rawlsian principles of equal justice—that voting should be not just a civil right under a liberal democratic constitution, but a civic duty as well. Some of the primary arguments against voting as a civic duty are then discussed and rejected, although possible limits on the duty to vote—both in principle and in practice—are acknowledged and briefly explored. The main implication of this chapter’s argument centers on a proposal for amending the U.S. Constitution to declare that all citizens have a duty as well as a right to vote, which could have significant consequences for election law and policy even without implementation or enforcement. Some possibilities for implementation or enforcement in the United States are nevertheless discussed, and while monetary fines associated with compulsory voting laws may be inconsistent with American sensibilities, there might be more openness to positive incentives that are not seen as actively compelling citizens to vote, and more generally to policies that are conceived as enabling and encouraging participation by offsetting the costs of voting.

Each of the four chapters of the dissertation can stand alone and be read independently, but they are held together by the framework of the calculus and by common themes running throughout the work. Furthermore, the chapters build upon each other and are in some sense cumulatively directed toward the ultimate conclusion in Chapter 4, which incorporates the arguments of previous chapters in its conclusion that the civic duty to vote can supply the missing foundation for broadly participatory theory and practice under modern conditions of liberal democracy. In this manner, the chapters all contribute to a more positive interpretation of the value of participating in elections, and all form part of this defense of voting.

### **3) METHODOLOGY: A VIEW TOWARD TO ELECTION LAW AND POLICY**

The methodological approach of this work is somewhat unconventional for a dissertation in public policy, and so this too may require explanation and defense. First is the presumption that law and policy are interrelated on a fundamental level, and that they can—and arguably should—be studied together. Clearly there is substantial overlap between these two interdisciplinary subject areas, the boundaries of each of which are already somewhat blurry. Certain areas are conventionally seen as the domain of law—constitutional interpretation, for example; however, judges interpreting the Constitution may be seen as “making policy” just as they are often seen as making law. Similarly, the political and administrative process through which government action is planned, promoted, implemented, and evaluated—which generally defines the policy process—clearly entails the involvement of law at many points. Policy needs law, just as law needs policy. In fact, law’s need for policy seems generally acknowledged and understood, for there is little doubt that law at all levels should be backed by policy principles, and that

judges in their interpretations of law should generally be guided by those principles of policy. However, it may be somewhat less well understood and acknowledged that policy is also crucially dependent on law, although perhaps this too should be obvious, as it is primarily—though not exclusively—through law that policy is given effect. Law and policy are thus inextricably linked in many subject areas, and the rules and procedures for conducting elections provide just a typical example. The first methodological assumption is therefore that legal and policy research should be more closely connected, and this work accordingly represents an effort to bridge the two disciplines.

This leads to the second methodological assumption—which is probably even more in need of defense—namely, that academic research in public policy should pay more explicit attention to the normative dimensions of policy problems. Again, scholarship in the legal academy appears generally to acknowledge and understand the need for normative theory and methods of analysis, but public policy as a discipline seems less open to this kind of approach. Instead, academic policy research seems largely to focus on applying empirical—and mostly quantitative—analytical methods to policy problems, as exemplified in its emphasis on “evidence-based policy,” in the general excitement about the promises of “big data,” and in the rising popularity of randomly assigned studies and “quasi-experimental” design approaches. Indeed, academic research in public policy is not generally known for engaging in normative theory and analysis, and most dissertations in the discipline take an approach very different from this one. This, arguably, is unfortunate, for while empirical methods may be crucial in helping to resolve many important policy problems, ignoring the need for foundational normative theory can lead to research questions and answers that are largely irrelevant in terms of the actual policy process.

Different areas of policy may be more or less in need of increased attention to normative issues, but voting rules and procedures might provide a perfect example of the need for this type of approach, given that the gaps between theory and practice seem so clear in this area. Rather than avoiding these admittedly difficult and politically charged issue areas, academic research in public policy could actually be in a perfect position to help connect democratic theory and practice in a more meaningful way. In fact, one of the forefathers of public policy, Harold Laswell, referred to the discipline around its inception as the “policy sciences of democracy,” which he anticipated would be specifically oriented toward identifying and resolving the “discrepancy between doctrine and practice” with regard to democratic ideals (Laswell 1951, 10). While Laswell may have been somewhat enamored of the burgeoning potential for quantitative analytical methods at the time, he was also sensitive to the need for policy research to include “a very considerable clarification of the value goals involved in policy” (9). Of course Laswell also clearly recognized the value of an interdisciplinary approach in policy research, and he specifically mentions the intersection of law and policy as a promising new development at the time of his writing (14). He concludes, “It is probable that the policy-science orientation in the United States will be directed toward providing the knowledge needed to improve the practice of democracy” (15).

The methodological approach of this dissertation is thus consistent with Laswell’s overall vision for research in public policy: It explores fundamental ideas in democratic theory relating to the value of participating in elections, utilizing normative methods common in legal research, and incorporating findings from empirical political science and formal analytical methods, to produce a policy-oriented analysis with real-world implications, particularly for electoral institutions in the United States, but also more broadly for democracies worldwide. For as argued throughout this dissertation,

foundational conceptions of voting in modern democratic theory, including basic notions of the meaning and purpose of participating in mass elections, have profound implications for election law and policy. A central premise of this work is that electoral institutions embody democratic theory in practice, and so election laws and policies—from U.S. Supreme Court doctrine down to the decisions of local administrators—are inevitably expressive of democratic ideals and values. Any critical analysis of electoral institutions therefore requires fundamental normative assumptions about what voting means—and how or whether voting matters—under prevailing conditions of democratic politics.

Additionally, the approach taken here further assumes that election laws and policies may themselves reflect back on normative conceptions of voting and inform prevailing ideas about the meaning and value of participating in elections. This is broadly consistent with the interpretive policy analysis of Dvora Yanow, which asks the general question, “*How Does a Policy Mean?*” (1996). Similarly, Suzanne Mettler and Joe Soss have drawn attention to this mode of policy analysis in an important article entitled, “The Consequences of Public Policy for Democratic Citizenship: Bridging Policy Studies and Mass Politics” (Mettler and Soss 2004). In contrast to conventional methods of analysis, Mettler and Soss advocate for conceptualizing political behavior as resulting from “policy feedback,” an analytical method they say “offers scholars an approach to mass politics that clarifies the place of public policy within the field of political behavior” (57). In fact, Mettler and Soss specifically associate their approach with analysis of low and unequal voter turnout, an approach they see epitomized in E. E. Schattschneider’s influential work on the structural reasons for nonparticipation in American politics (58). Indeed, in *The Semisovereign People*, Schattschneider expressly states, “The expansion of the participating political community ought to be a major objective of American

politics,” an objective he indicates will require development of “public policy about politics” (Schattschneider 1960, 112-113). Moreover, he states this approach should force scholars to “reexamine the chasm between theory and practice” in American democracy (131).

The essential point here is that many—if not most—of the key legal and policy issues related to electoral rules and procedures involve fundamental normative questions, for not only do theoretical conceptions of the value of voting have important implications for electoral institutions, but these institutions themselves also have significant consequences for ideas of democratic meaning and purpose. Empirical analysis may therefore be incapable of providing much guidance in the major problem areas of election law and policy.

For example, research on strict voter identification laws—the subject of widespread debate in recent years—has largely focused on analyzing the effects these laws may have on patterns of turnout, and particularly on their potential for discriminatory demographic or partisan effects. This line of research may be interesting and informative, and perhaps even useful in some manner, but it neglects a fundamental normative question regarding these administrative requirements, which is as follows: Is it acceptable for *any* individual citizen to be disenfranchised due to lack of an official identification document? This question arguably poses a more policy-relevant problem than estimating the turnout effects of various ID laws, although it is a normative question that is presumably more difficult, particularly since it may have no objectively correct answer. Nevertheless, this work posits that these types of questions pose important policy problems that demand discussion and analysis (and there might actually turn out to be more consensus than expected on the answers). Again, this is not to say that empirical analysis of the effects of voting rules and procedures is not also interesting and important,



and potentially relevant to election law and policy: For instance, if an ID requirement is demonstrated to have a discriminatory effect on the participation of certain groups, this should certainly count as a strong policy argument against it, and it may of course have legal consequences as well. However, empirical analysis cannot substitute for—and should not be allowed to “crowd out”—research on broader normative problems relating to voting rules and procedures.

Furthermore, it is essential not to allow policy questions to be determined by the methodological tools that happen to be available, but rather first to determine what policy questions are important, and then to use whatever methods are best suited for addressing these questions. The framing of what are considered to be policy-relevant questions not only influences the substance of public policy debates, but perhaps more importantly, it reveals and reinforces certain theoretical assumptions, some of which might actually be counterproductive to broader normative objectives.

Returning again to voter ID laws, current debates revolve largely around the assumption of an inevitable tradeoff between competing interests in electoral integrity and participatory access. Without entering here into the details of this debate, there should of course be no dispute about the need to secure the electoral process from fraud and error, which clearly entails identification procedures of some kind to ensure that individuals vote only once, vote in their own name, are eligible to vote, etc. However, administrative procedures for electoral integrity must be designed around fundamental democratic norms. For example, the institution of the secret ballot makes securing elections much more difficult, but it is today universally accepted as a normative requirement of democracy, and efforts to ensure electoral integrity simply have to work within the constraints of ballot secrecy. Similarly, if disenfranchisement for lack of a valid identification document were viewed as normatively unacceptable, as a matter of

participatory democratic theory, then security procedures would just need to work within that constraint (which incidentally is not that difficult in practice, though that matter is beyond the current scope). The fact that scholarly debates around voter ID laws seem instead to center mostly on empirical questions of how many individuals might be deterred from voting, and whether certain demographic groups are disproportionately affected, can be seen as conceding the fundamental normative question of whether it is acceptable for even *one citizen* to be disenfranchised by an unnecessary administrative requirement.

This methodological critique may extend to other areas of public policy where empirical analysis seems generally insufficient to answer important questions, and might even in some ways be counterproductive. However, the need for a normative approach seems especially evident for policy issues involving electoral institutions and the motivating factors of voter turnout, as explored in this dissertation through the framework of the calculus. In fact, many of the election laws and policies discussed in this work have effects on turnout that are fairly clear; what is unclear is how to interpret the normative significance of these effects. Thus, the overall argument here is that public policy in the area of voting rules and procedures is not really in need of more empirical research at this time, and to the extent that such research may be needed, it can probably be provided by the traditional academic disciplines. Rather, now in particular—with the value of voting and democracy itself under serious threat—what is urgently needed, what the discipline of public policy is in a unique position to provide, and what this dissertation aims to contribute, is increased attention to the normative foundations of democratic elections. One might hope this approach will contribute to the eventual development of broader consensus in this area, but even if no consensus on these matters is possible, the discussion itself may be important and useful—especially in drawing attention to the gaps

between theory and practice regarding the individual-level interest in electoral participation.

Some might respond that current debates over voting rules and procedures are at root matters of base political partisanship, and thus arguably do not even deserve to be treated as matters of election law and policy, except perhaps to suggest procedural reforms seeking to constrain the manipulation of electoral institutions for political purposes. The problem of partisanship in the adoption—and reform—of voting rules and procedures is certainly an important area of focus, but more substantive discussion of normative theory is also needed, not least because partisan actors generally try to frame their actions as based on substantive principles. Furthermore, even if the influence of partisanship could somehow be eliminated—or perhaps at least reduced—the missing links between democratic theory and practice would remain, and would still need to be addressed.

There is no doubt that the issues raised here are highly charged politically, particularly given the polarized environment currently dominating American politics, where suggestions of electoral reform are almost automatically perceived—probably quite often correctly—as intended to influence electoral outcomes and the distribution of political power. Moreover, beyond the partisan battles there is also a potentially more principled argument over where the authority to determine voting rules and procedures should actually reside, and precisely how that authority should be distributed among federal, state, and local levels of government—and perhaps also the judiciary. It might therefore be especially difficult to locate foundational normative principles underlying these complex and highly politicized debates. However, scholarship in election law and policy should not evade these important issues simply because they are politically sensitive or philosophically contentious. In fact, it is specifically hard problems like these

that arguably deserve and require increased scholarly attention, and abandoning the field only makes it easier for partisan manipulation of electoral institutions to continue.

Once again, the discipline of public policy—with its methodological flexibility and its orientation toward improving the democratic process—is ideally suited for this type of research, at least if there is a willingness to devote more attention to the normative dimensions of policy problems and to avoid the temptations of bright-line distinctions between policy and politics. As Deborah Stone has emphatically stated, “Policy analysis is political argument, and vice versa” (Stone 1997, 375). Stone’s approach relies on recognition that the policymaking process is inevitably structured by conflicting interpretations of fundamental normative ideals and standards, which is why there is a need for critical-interpretative perspectives in policy analysis like the one in this work. More research along these lines might actually help better define the function and position of public policy among the academic disciplines, perhaps bringing it closer in line with the overall model of the legal academy. Regardless of methodological proclivities, in the end, the approach taken in this dissertation is hopefully justified by the outcome of the research itself—to the extent that important and useful perspectives on election law and policy do emerge from reinterpretation of the terms of voting calculus, and that this defense of voting may be judged successful.

## Chapter One: Reinterpreting $p$ —A New Theory of How Individual Votes Contribute to Electoral Outcomes\*

“If a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend’s or of thine own were...”

—John Donne (1959 [1623], 108)

“Everybody wants to rule the world.”

—Tears for Fears (1985)

### 1) INTRODUCTION

What is the probability that one vote will affect the outcome of an election? The conventional assumption—almost uniformly shared in the voting literature—is well known: The larger the electorate, the smaller the probability that any individual vote will affect the outcome, with that chance essentially equal to zero in all mass elections of modern democracies. From the individual-level point of view, therefore, participating in elections is said to be effectively meaningless, or more precisely, instrumentally useless. This chapter, however, argues that the conventional answer is wrong, or more precisely, that it represents a demonstrable mistake in normative reasoning. In its place is proposed an alternative interpretation of the probability of one vote affecting an election outcome, an interpretation that not only seems preferable from a normative perspective, but which is arguably also more empirically plausible than the conventional view.

This alternative interpretation of the efficacy of individual votes in large elections has crucial consequences for theoretical conceptions of voter turnout, in addition to having potentially broad relevance to ideas about the nature of rational behavior and the

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motivations for participating in collective action. However, this is not just a matter of theory, for as discussed in the introduction to this dissertation, and as detailed below, the interpretation of how individual votes contribute to outcomes also has important implications for election law and policy. Normative concepts of the meaning and purpose of voting in a representative democracy inform the design of electoral institutions, and the rules and procedures for administering elections therefore reflect fundamental conceptions of democratic values (Thompson 2002, vii-viii). In short, elections put democratic theory into practice. Overall, this work argues that the conventional theory proclaiming the instrumental futility of electoral participation results in tremendous underestimation of the potential value of voting at the individual level. The alternative interpretation offered here thus helps constitute a defense of a more expansive participatory approach in the practice of elections. At the same time, this new interpretation highlights the importance of competitive elections for effective representation, and so it also lends support to electoral reforms based in the competitive school of democratic theory.

The probability of one vote affecting the outcome of an election is one of the most widely cited statistics in the voluminous voting literature. Anthony Downs was perhaps the first to formally consider “the probability that any one citizen’s vote will be decisive” to the outcome of a large election. While indicating that this probability is never exactly zero, Downs famously concludes that “under most circumstances, it is so negligible that it renders the return from voting...infinitesimal” (Downs 1957b, 146). Following Downs, Riker and Ordeshook’s (1968) canonical work codifies the individual decision to vote or abstain in the well-known calculus of voter turnout:  $pB - C + D$ . Formalizing the rational choice approach to the turnout decision,  $pB$  represents the probability that an individual’s vote will affect the election outcome ( $p$ ), multiplied by the expected utility differential

between the candidates on the ballot ( $B$ ), while the  $C$  term represents the costs of voting to the individual, and  $D$  represents any utility gained from the act of voting independent of the outcome—such as gratification from complying with a perceived duty to vote, or other “expressive” benefits.<sup>1</sup> The calculus designates that if the sum of these terms is positive, the individual votes, while if negative, the individual abstains (Riker and Ordeshook 1968, 25).

In this chapter,  $p$  is analytically isolated from the other elements of the calculus in order to focus on what exactly it means for an individual vote to have a causal effect on an election outcome. It is, however, important to note how the interpretation of  $p$  influences interpretations of the other elements of the calculus: The value of  $p$  affects  $B$  directly, but it can also affect how  $C$  and  $D$  are construed, for if  $pB$  is assumed to be negligible, yet individuals are observed voting, the assumption must be that  $C$  is low, or that  $D$  is high (or both), as discussed below. As mentioned in the introduction, the approach of this dissertation is not to focus on the calculus as an empirical model of the turnout decision, although there may be testable hypotheses associated with the new interpretation on  $p$  proposed below. Instead, the calculus is utilized just as a framework for analyzing the factors that influence individual decisions to participate or abstain from voting—here specifically, the expected probability of having a causal impact on the election outcome. The goal of this work is thus not empirical analysis, but rather normative evaluation of the concept of individual causation in elections, which leads to specification of a new formal model for this element of the turnout decision, and to implications for participatory norms and for election law and policy.

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<sup>1</sup> The  $D$  term may also be said to represent the “consumption” benefits of voting, as opposed to the “investment” benefits represented by  $B$  (see Ferejohn and Fiorina 1974, 526).

While continuing empirical research on electoral institutions and voting behavior may be useful and important, the type of normative inquiry conducted here is arguably needed more urgently, as stronger foundations in democratic theory are essential to the development of more principled and coherent election laws and policies. There appears to be fairly wide agreement among legal scholars that the normative underpinnings of American electoral institutions are muddled and disorderly, particularly when viewed through the lens of U.S. Supreme Court decisions in this area (Karlan 1993; Gardner 1997; Issacharoff and Pildes 1998; Gerken 2002; Charles 2007; Post 2014). There are, however, differences of opinion on how stronger theoretical foundations could be constructed. Much of the debate has centered on whether constitutional issues in election law should be decided using traditional individual rights balancing tests (Hasen 2003), or whether a structuralist approach that explicitly considers core democratic goals and values is more appropriate (Pildes 2004b; Elmendorf 2008).<sup>2</sup> In broad terms, these debates trade on fundamental conceptions of democratic representation, including participatory and competitive variants of emphasis in democratic theory. This chapter does not take a definite side in these debates, but instead describes how the new interpretation of causation in voting has distinctive implications under these varying theoretical approaches.<sup>3</sup>

Section 2 below discusses the so-called paradox of voter turnout and reviews some of the previous attempts at reinterpreting the calculus to resolve this purported

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<sup>2</sup> Others have argued that the rights versus structure debate is not particularly useful (Charles 2005), that it is not generally applicable across different types of election law cases (Fishkin 2011), or that it fails to capture important aspects of representational democratic theory (Stephanopoulos 2014). A few scholars have expressed skepticism about calls for more explicit theoretical foundations in election law jurisprudence, worrying that judicial decisions tend to unnecessarily “lock in” a specific approach to democratic theory (Cain 1999; Lowenstein 2002).

<sup>3</sup> This is perhaps consistent with the intermediary approach of Daniel Farber, who indicates that election law issues generally implicate both structural and individual rights concerns (Farber 2004).



problem. Section 3 articulates the critique of the conventional interpretation of  $p$  leading to the paradox, and then introduces a new causal logic of voting based primarily on theoretical insights from Richard Tuck's innovative work, *Free Riding* (2008). Section 4 develops and elaborates on Tuck's basic theory by proposing a formal model and simulating how this new interpretation of  $p$  could be calculated in actual elections. Section 5 responds to initial critiques of this alternative approach and considers some normative implications of how individual causation in elections is conceived. Section 6 discusses practical implications of this new model, reexamining a few central issues in American election law and policy in light of the new understanding of how individual votes contribute to outcomes. Section 7 concludes and points out directions for future research in this area.

## **2) THE PARADOX OF VOTER TURNOUT**

Riker and Ordeshook formally define  $p$  as the probability that an election is expected to result in a tie, which would allow a single individual to cast a tie-breaking vote that is decisive—or pivotal—to the outcome,<sup>4</sup> and they show how the value of  $p$  is higher the closer the outcome is expected to be (Riker and Ordeshook 1968, 31-32). Owen and Grofman further specify  $p$  as the “subjectively estimated probability that [one’s] vote will change the election outcome from what it would have been had [one] not voted” (Owen and Grofman 1984, 312). They formally model  $p$  as a function of both the size of the electorate and the expected closeness of the outcome, and they

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<sup>4</sup> This assumes the total number of voters, including the individual voter, is odd. If the total is even,  $p$  represents the probability of an individual vote causing (rather than breaking) a tie. Riker and Ordeshook model  $p$  for this case as well, but an odd total can be assumed for simplicity, given any substantial number of voters (see e.g. Owen and Grofman 1984, 312). The terms “decisive” and “pivotal” are used interchangeably.

demonstrate how in a two-candidate race forecasted as a virtual dead heat, the size of the electorate would have to be less than 10,000 for  $p$  to rise above 0.01, while for an evenly split electorate of 1 million voters,  $p$  equals approximately 0.0008 (315). Owen and Grofman thus conclude, “no matter how close an election, it is almost inconceivable that one vote will prove decisive” (318).<sup>5</sup>

Empirical studies of actual election results echo the conclusion that the value of  $p$  is always negligible in any large election. Mulligan and Hunter calculate the average probability of casting a pivotal vote in a U.S. House or state legislative race to fall somewhere between  $2/n$  and  $1/n$ , where  $n$  is the number of voters in the electoral district (Mulligan and Hunter 2003, 51). Similarly, Gelman, Katz, and Bafumi find that the chance of casting a pivotal vote in a U.S. presidential election is on the order of  $1/n$ , where  $n$  is the size of the state electorate (Gelman et al. 2004, 669). Such studies utilize complex statistical methods to derive the value of  $p$ , but their conclusions are clear and unequivocal in devaluing the instrumental efficacy of an individual vote. Gelman, Silver, and Edlin thus compare the act of voting to buying a lottery ticket with about a 1 in 10 million chance of winning (Gelman et al. 2012, 324; see also Jankowski 2002). Thomas Schwartz describes the upper limits of  $p$  in the closest of elections, and he concludes, “Saying that closeness increases the possibility of being pivotal...is like saying that tall [people] are more likely than short [people] to bump their head on the moon” (Schwartz 1987, 118). Likewise, Paul Meehl grimly asserts that the “chances of determining who

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<sup>5</sup> Owen and Grofman’s method assumes that the expected closeness of the election is known—or at least estimated—as an exact figure. Fischer (1999) describes an alternate method of calculating  $p$  that utilizes polling data to create a margin of error around the expected outcome, which yields even smaller probabilities. For example, in a population of 1 million voters who appear—based on a sample of 300—to be evenly split, Fischer’s method would put the chance of casting a decisive vote at about 0.000014. Thus, the chance of one vote being pivotal is arguably even more “inconceivable” than Owen and Grofman estimate. Fischer attributes his method to Good and Mayer (1975), while Owen and Grofman’s method builds on the work of Beck (1975) and others.

becomes president are of about the same order of magnitude as [the] chances of being killed driving to the polls—hardly a profitable venture” (Meehl 1977, 11).

These are the types of descriptions that form the background for what is known as the paradox of voter turnout. Why—at least from a perspective of instrumental rationality—would so many individuals bother to engage in an activity with only a negligible chance of having any causal efficacy? This is the problem that led Riker and Ordeshook (1968) to introduce the *D* term into the calculus, representing the non-instrumental motivations that seem necessary to explain why (relatively) large numbers of people do turn out to vote in mass elections.<sup>6</sup> Such motivations may also justify the decision to vote in terms of “collective rationality,” where an individual’s group membership produces social pressure that makes participation rational notwithstanding a lack of individual-level instrumental efficacy (Uhlener 1989; Morton 1991).<sup>7</sup> More generally, the *D* term represents expressive motivations for voting, which may have social-psychological or “existential” foundations (Schuessler 2000), and it also includes moral impulses toward cooperative behavior, which may be associated with a “rule-utilitarian” approach to the turnout decision (Harsanyi 1980; Feddersen and Sandroni 2006a). Furthermore, explanations of turnout that rely on the motivation to increase a preferred candidate or party’s political “mandate” may also be included in the *D* term,

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<sup>6</sup> Downs originally proposed a somewhat similar solution to the paradox, suggesting that many individuals decide to vote after considering that the democratic system would collapse if no one participated in elections (Downs 1957a, 261-262). However, this solution runs back into the paradox, since individuals should reason that their individual vote would be highly unlikely to be pivotal to saving democracy (Fiorina 1976, 392). Riker and Ordeshook address the paradox more directly by defining *D* in terms of ethical, or social-psychological gains in utility. They thus list several types of personal satisfaction that an individual might derive from the act of voting, even indicating that certain voting costs could be perceived by some individuals as benefits (Riker and Ordeshook 1968, 28).

<sup>7</sup> Note that leaders of large groups, or others with wide spheres of influence (including parties and candidates), might conceivably influence enough votes to have a non-negligible chance of being pivotal to an election outcome (Uhlener 1989, 402; see also Shachar and Nalebuff 1999). However, such attempts to influence outcomes through exertions of social pressure are not directly encompassed by the voting calculus, which addresses the individual motivation to turn out and cast a single vote.

since any expected utility in this case is derived independently of the electoral outcome (Guerrerro 2010; Mackie 2014).<sup>8</sup>

To some, however, the *D*-term solution to the paradox is not a sufficiently rational explanation of the turnout decision, and it was criticized early on as a tautological and non-predictive model (Barry 1970, 13). Moreover, the assumption that the decision to vote is characterized primarily by expressive benefits raises issues beyond the question of whether a *D*-term solution is theoretically satisfying. The absence from the voting decision of any direct concern for an instrumental effect on the outcome can be said to open the way for “electoral irrationality of the most basic kind” (Brennan and Buchanan 1984, 199), and expressive voting could lead individuals to vote for “morally unsavory” policies they would not choose if they thought their vote might actually impact the result (Brennan and Lomasky 1985, 204). Less perniciously, but perhaps more practically relevant, a purely expressive motivation for voting counsels always casting one’s ballot in favor of the most preferred candidate or party, regardless of that candidate or party’s chances of winning, given that one vote could never conceivably affect the outcome (Owen and Grofman 1984, 322). There may thus be serious consequences if voting is characterized as only expressively—and never instrumentally—rational.

More generally, however, addition of the *D* term to the calculus may be useful to symbolize how the turnout decision can incorporate both instrumental and expressive elements (Fiorina 1976, 393). In the real world it might be difficult or impossible to distinguish such motivations from one another (Fischer 1996, 172), and such is not the present purpose. The intention here is rather to demonstrate how voting could indeed have instrumentally rational motivations, because the value of  $pB$  may in fact be non-

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<sup>8</sup> However, such explanations presumably remain subject to the paradox, as individuals should reason that their one vote would make no appreciable difference in the value of any political mandate.

negligible, and the  $D$  term therefore need not hold all the “action” in the calculus, as often assumed (Fiorina 1976, 393; see e.g. Copeland and Laband 2002). This is not to imply that addition of the  $D$  term is the only avenue of escape from the paradox. To the contrary, John Aldrich’s oft-cited conclusion is that turnout is best explained as a “low-cost, low-benefit decision,” and that voting is therefore not a genuine collective action problem at all (Aldrich 1993, 265). Furthermore, others have suggested that including altruistic or social benefits in the value of  $B$  could yield a utility high enough to make voting instrumentally rational notwithstanding an infinitesimally small value for  $p$  (Margolis 1982; Jankowski 2002; Edlin et al. 2008).

Moving beyond solutions based on interpretations of  $B$ ,  $C$ , or  $D$ , there have also been more direct attempts to avoid the paradox by reinterpreting or modifying the understanding of  $p$ . In addition to their  $D$ -term explanation, Riker and Ordeshook also suggest that voters might simply be greatly overestimating their probability of being pivotal due to widespread “propaganda” about the importance of individual votes in close elections (Riker and Ordeshook 1968, 39).<sup>9</sup> Others have suggested that voters either fail to understand or even consider their probability of casting a pivotal vote, instead relying on broad predictions of the chance that their preference will prevail (Hinich 1981; Peters 1998). These simplified approaches may or may not have empirical support,<sup>10</sup> but they

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<sup>9</sup> Similarly, Gregory Brunk (1980, 550) writes, “[T]he reason why so many people vote is because democratic societies systematically feed their citizens false information about the utility each individual personally gains from the franchise.” Downs actually suggests that the value of  $p$  could be “significant if [one] thinks the election will be very close” (Downs 1957b, 146), but it is not clear whether he thinks this valuation would be a statistical error, and he does not mention it resulting from propaganda.

<sup>10</sup> There is in fact some evidence that individuals either overestimate or fail to consider the probability of casting a pivotal vote (Blais 2000, 62-70; Blais et al. 2000, 191; Klor and Winter 2006; Esponda and Vespa 2010). In general, there appears to be little empirical support for pivotal thinking outside of small-group experiments, and some contradictory evidence even at that level. Experimental studies that raise doubts about pivotal theory include: Tyran (2005), Klor & Winter (2007), Coate et al. (2008), Esponda & Vespa (2010), Großer & Schram (2010), and Morton & Tyran (2012). Experiments finding evidence for pivotal voting in smaller groups include Fischer (1996), Levine & Palfrey (2007), Duffy & Tavits (2008), and Feddersen et al. (2009).

clearly fall short of a theoretically grounded resolution of the paradox that remains consistent with an instrumentally rational approach (Dowding 2005, 452).

Other  $p$ -based solutions to the paradox do not rely on assumptions of miscalculation or misunderstanding on the part of voters. One such approach is Ferejohn and Fiorina's (1974) minimax regret model, which frames the turnout decision as taking place under conditions of generalized uncertainty (rather than specifiable risk), where the prevailing assumption is that it is rational to minimize the chance for an occurrence that would cause the maximum amount of regret. This approach effectively eliminates the need to consider  $p$ , as minimax regret logic appears to reduce the calculus to just the  $B$  and  $C$  terms (Ferejohn and Fiorina 1974, 528).<sup>11</sup> However, the minimax model is not generally accepted as a viable solution to the paradox (Dowding 2005, 449; Geys 2006b, 21; Blais et al. 1995). For one thing, election outcomes are generally not completely—or even very highly—uncertain, as probabilities are quite often assigned to expectations about results. More fundamentally, however, the logic of pivotal theory in fact finds its way back into the minimax calculus: Maximum regret is said to arise from abstaining when one's preferred candidate loses by one vote (or ties), but the chance of that occurrence remains infinitesimal in any large election. As Aldrich concludes, “[T]he positive prediction of turnout in minimax regret swings on the same set of (still just as wildly implausible) circumstances as in the calculus of voting” (Aldrich 1997, 381).

Aldrich reaches a similar conclusion regarding attempts to rationalize turnout by reinterpreting  $p$  in a strategic context, indicating that “game theoretic models of turnout are apparently ‘driven’ by the same basic features as the individual decision-making models” (Aldrich 1997, 383). Other proposed solutions model the turnout decision as an

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<sup>11</sup> Ferejohn and Fiorina are skeptical regarding the need for adding the  $D$  term to the calculus, asserting that “it is rational for many citizens to vote even if they neither distort their individual impact nor place a direct value on the act of voting” (Ferejohn and Fiorina 1974, 526).

adaptive learning process grounded on previous voting experiences, thereby interpreting  $p$  in a way that makes participation more likely to be instrumentally rational (Kanazawa 1998), or eliminating the need to calculate  $p$  altogether (Bendor et al. 2003). However, these models depart from the central assumption of forward-looking utility maximization in the calculus. Moreover, the main assumption of these models—that the turnout decision is based on perceptions of positive or negative outcomes associated with past actions—generally fails to correspond with empirical evidence regarding the motivating factors of turnout (Dowding 2005, 451; Guinjoan et al. 2014).

There have also been some notable attempts to resolve the paradox by stepping outside conventional causal logic. In place of the individualized expected utility maximization employed by the causal decision theory of the calculus, Robert Grafstein (1991) suggests an “evidential” decision theory in which potential voters base their actions on expectations regarding the behavior of other similarly situated individuals. Accordingly, if one believes that most members of one’s social group are likely to vote for the same candidate or party, this increases the “conditional” expected utility of one’s vote, notwithstanding the fact that one’s decision to vote has no causal impact on anyone else’s actions. Grafstein explains this as an application of “stochastic dependence,” which he identifies with generalizing from one’s own behavior in a manner suggestive of the Kantian imperative, asking, “What if everyone did that?” (Grafstein 1991, 1006). This logic, however, has been faulted for irrationally confusing causal with “diagnostic,” or “correlational” contingencies, which Quattrone and Tversky refer to as “the voter’s illusion,” in which individuals mistakenly believe that their own decision to participate has some effect on the turnout decisions of others (Quattrone and Tversky 1988, 733-734). Jon Elster similarly criticizes this approach as an erroneous application of “everyday Kantianism” that rests on a form of “magical thinking” (Elster 1989, 195).

Grafstein's theory does indeed seem problematic to the extent that it relies on assumptions that cannot be supported within the conventional rational choice framework of the calculus (Dowding 2005, 450).<sup>12</sup> Nevertheless, his approach is noteworthy for recognizing the potential role of collective interdependence in the individual turnout decision, and it perhaps points toward a more ethically grounded theory of the decision to participate.

In sum, while there have been many attempts at resolving the paradox of voter turnout, the conventional interpretation of  $p$  as the probability of casting a pivotal vote continues to pose a major obstacle to theoretical modeling of the turnout decision. Hence, Keith Dowding's comprehensive review of proposed solutions to the paradox describes these efforts as a "pathological quest for the holy grail of individually rational turnout" (Dowding 2005, 442). Dowding expresses doubts about whether an individual contribution can ever be conceived as having a "useful effect" on the outcome of a large election, maintaining that any perceived effect is likely "an expressive value masquerading as an instrumental one" (452). He also offers a practical critique of pivotal theory, indicating that no candidate would ever strive toward a one-vote margin, not just for prudential reasons, but because it would represent the weakest possible victory in terms of political mandate (Dowding 2005, 451-452). It does indeed seem clear that politicians and campaign strategists have incentives to challenge pivotal theory and mobilize supporters by arguing that their individual contributions could actually affect the outcome of the election. The question is, should prospective voters view this as mere propaganda, or might these urgings in fact allude to another way of interpreting the causal effect of individual votes?

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<sup>12</sup> In subsequent work, Grafstein concludes that his notion of conditional expected utility ultimately "disables the core notion of free choice and self" (Grafstein 1995, 78), which certainly seems inconsistent with rational choice theory.



### 3) TOWARD A NEW CAUSAL LOGIC OF VOTING

As indicated, pivotal voting theory assumes that an individual's participation affects the result of an election only when it directly changes the outcome. This implies a counterfactual—or “but for”—logic of conditional causation, meaning that a given outcome is caused by an individual only if it would not have occurred without that individual's participation. However, it is also possible to conceive of causation taking place in the absence of a strictly counterfactual relationship. In tort law, for example, if two defendants separately started fires that each independently would have burned down the plaintiff's property, either one can be held fully responsible for causing the damage, even though neither was a “but for” cause of the result (Wright 1985, 1776). Another example is a firing squad, where no one member of the squad is a “but for” cause in the execution, but moral responsibility may still be assigned to each participant individually (Goldman 1999, 205). These situations may be referred to as cases of *overdetermined*, or redundant, causation.

Derek Parfit points out that overdetermined causation often generates normative dilemmas, as “mistakes in moral mathematics” can emerge from concentrating only on the effects of an individual act, while “ignoring the effects of sets of acts” (Parfit 1984, 70). The examples of the fire-starters and the firing squad are cases where each individual acting alone would have been fully sufficient to bring about the outcome, but Parfit also gives examples of overdetermination arising in contexts where collective action is required to achieve a certain goal (72).<sup>13</sup> There may thus be reason to doubt whether the

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<sup>13</sup> In connection with voting, Parfit disputes the claim that “below some threshold, extremely small chances have no rational or moral significance” (Parfit 1984, 73). However, he invokes the conventional interpretation of  $p$ —assuming it to equal about one in a hundred million—and suggests that voting may still

counterfactual causal logic of pivotal theory is truly the most appropriate way to model the turnout decision. Nonetheless, hardly anyone seems to have questioned the assumption that instrumentally rational voters should only value being a counterfactual cause of the outcome, and more specifically, that they should discount their expected benefits by the probability that their vote will be pivotal.<sup>14</sup> It is worth emphasizing at this point that defining the boundaries of rational action is a fundamentally normative endeavor. In the words of John Harsanyi, the concept of rationality is normative simply because “it points to what we *should* do in order to attain a given end or objective” (Harsanyi 1986, 83). Pivotal theory can thus be seen as setting a specific normative standard for rationality—a standard that, incidentally, has implications not just for voting, but for other collective action situations as well.

In one of the rare critiques of pivotal theory, Patrick Dunleavy pointedly asks, “What is rational about wanting to be a unique swing voter in contexts where large numbers of actors are involved?” (Dunleavy 1997, 56). Tracing the origins of pivotal theory to the works of Downs (1957a) and Olson (1965) applying the expected utility analysis pioneered by von Neumann and Morgenstern (1947), Dunleavy admits that it makes sense to assume that rational actors in a collective action situation should discount their expected benefits by some probability factor (Dunleavy 1997, 57-63). However, he forcefully rejects the assumption that this discount factor should be the probability of being pivotal to the preferred outcome, and he ultimately characterizes the desire to be pivotal within a large group as not only “not rational,” but even “pathological, almost psychotic” (81). His particular arguments against pivotal theory may not be very

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be instrumentally rational given the expectation of an extremely large public benefit, thus relying on a *B*-term solution to the paradox (74-75).

<sup>14</sup> Of course, many scholars have criticized rational choice theory as a model of political or social behavior (e.g. Green and Shapiro 1994; Udehn 1996). Few, however, appear to question the specific assumption that the desire to be pivotal is inevitably associated with rational choice in a collective action situation.

convincing,<sup>15</sup> but Dunleavy makes at least one point that seems novel and noteworthy, and which suggests—albeit obliquely—a different way of thinking about what it means to have a causal effect on an election outcome.

Dunleavy mentions an obvious consequence of pivotal theory that seems to have gone largely overlooked: It is that no individual can ever be *solely* pivotal to an election outcome. The reasoning is simple: In any election decided by a margin of one vote (or tied), *everyone* who cast a vote for the winner (or either side if tied) would “simultaneously be equally pivotal” (Dunleavy 1997, 79). In other words, the crowning achievement of pivotal theory, the goal toward which all rational actors should presumably be striving—casting a vote that individually decides the election—is by definition always a shared experience. Dunleavy argues that the fundamental ideal of pivotality is thus basically unrealizable, since “many others voting or abstaining would have an equal claim to being the decisive actor” (79). Strictly speaking this could be mistaken, as one might still insist that it is rational to participate only to the extent that one’s vote will be pivotal, even if this distinction must always be shared with other voters. However, the requirement of always having to share any claim to pivotal causation hints at an alternate way of thinking about causing an election outcome.

Perhaps the pivotal situation is best framed simply as a representation of the closest possible election. Yet elections can of course be very close without being as close

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<sup>15</sup> Dunleavy argues that the concept of pivotality is problematic because it is subject to formal ambiguity, since there could be reasonable disagreement, even after the fact, about whether an individual’s vote was decisive to an outcome. The reason, he argues, is that a pivotal situation could also arise from the perspective of an abstainer whose participation might have affected the result, or from a voter contemplating voting against preference (Dunleavy 1997, 75). (He admits that voting against preference seems implausible, but he implies that it could happen as a result of ambivalence or uncertainty.) In the latter case, a pivotal situation could arise from a two-vote difference, as a changed vote by anyone who would otherwise have voted for the winner (assuming a two-candidate race) would create a tie. Dunleavy’s objections, however, do not challenge the basic assumption of counterfactual causation employed in pivotal theory, and the formal ambiguities he points out seem trivial in large electorates.

as mathematically possible. In fact, when a very large election is decided by 2 votes, or 10 votes, or 100 votes (or even say 537 votes), the outcome may be statistically indistinguishable from the pivotal situation. It is thus arguably a mistake to draw what is virtually an arbitrary line at the ultimate degree of closeness—i.e., a one-vote margin (or a tie)—and then to assume that participation becomes utterly ineffectual, from an individual perspective, at any greater margin. Instead, what seems missing is a way to define and measure how an individual vote could still represent a causal factor as an electoral outcome diverges from the pivotal situation.

As indicated, when an election is decided by one vote, everyone who voted for the winner—bracketing for now those who voted for the loser—was strictly pivotal to the outcome. When an election is decided by *two* votes, the conventional assumption is that *no one* was pivotal. Note how this is tantamount to asserting that each individual voter—holding all other voters constant—could have abstained without altering the outcome. However, while this may be true in a formal sense, practically speaking it seems problematic, for given a two-vote margin the outcome would have changed if any more than one person voting for the winner had abstained. More realistically perhaps, instead of saying that no one was pivotal in an election decided by two votes, one might instead assert that *everyone* (who voted for the winner) was pivotal, *except for one voter*. Moreover, since votes are perfectly fungible and effectively simultaneous, there is no way of knowing which voter cast the one non-pivotal vote. Therefore, if  $X$  equals the number of votes for the winner, everyone voting for the winner had a  $1/X$  probability of having cast the non-pivotal vote, or an  $(X-1)/X$  probability of having been pivotal to the outcome.

Admittedly, the term “pivotal” is being stretched beyond its intended meaning here. A vote in the true pivotal situation is not only individually *necessary* to an election

outcome, it is also, in some sense at least, individually *sufficient* to bring about the outcome.<sup>16</sup> In the case of an election decided by a margin of two votes, there exists a set of  $X-1$  votes that were each individually necessary, and that were collectively—though not in any sense individually—sufficient to cause the outcome. Although in practice no one voter can be identified with certainty as having been part of that set, nevertheless, everyone who voted for the winner has an  $(X-1)/X$  probability of having been *individually necessary* to a set of votes that were *collectively sufficient* for the outcome. In the terminology of Richard Tuck, we can identify an “efficacious set” of votes, “with each vote in the efficacious set having true causal efficacy in bringing about the result” (Tuck 2008, 44). In a plurality voting system, this set of votes will always contain exactly one vote more than the number of votes for the second-place finisher, since this is the number of votes needed to win.<sup>17</sup> It is thus simple to calculate the *ex post* probability that an individual vote was in the efficacious set by dividing the number of votes in this set—the second-place finisher’s tally plus one—by the number of votes the winner actually received. The probability of being in the efficacious set can then be said to represent the chance that an individual vote causally contributed to the election outcome, in the sense of having been individually necessary to that outcome.

While the above calculation may be quite simple, the underlying concept is another matter. At issue here is the essential nature of the collective action problem posed by opportunities for participation in very large groups. In fact, Tuck’s pathbreaking work,

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<sup>16</sup> One vote, even if pivotal, can never truly be individually sufficient, since an election by definition requires collective action. Nevertheless, from a *ceteris paribus* perspective, a pivotal vote can be seen as individually sufficient to bring about the desired outcome. This is related to the fact that being pivotal is always a shared experience, yet each individual claims counterfactual causal power over the outcome.

<sup>17</sup> This also holds true for majority-rule elections with only two candidates, and even with more candidates the two top finishers may be said to win—in the sense of advancing to a runoff—by obtaining at least one vote more than the third-place finisher. The idea of an efficacious set of votes under a system of proportional representation (PR) is more complicated, and calculating values for  $p$  under PR is a complex problem beyond the current scope (see Blais et al. 2014).

*Free Riding* (2008), poses a direct challenge to Mancur Olson's well-established theory, in *The Logic of Collective Action* (1965) regarding the negligibility of individual contributions to very large enterprises. Tuck explains that voting is a type of collective action problem that is not actually a good example of a "genuinely Olsonian problem," because there is always a specific threshold that determines the outcome of an election (Tuck 2008, 44). The real Olsonian problem, according to Tuck, is a situation portrayed by the paradox of the sorities, an ancient riddle asking when a collection of grains of wheat becomes—or ceases to become—a "heap." The paradox, of course, is that one can never identify a threshold, for at any point it could be argued that one grain more or less would make no difference (67). Tuck explains how in a true sorities situation with no threshold, one might argue—as does Olson—that any individual contribution has only a negligible effect, since there is no identifiable point when an additional contribution clearly matters. In cases like elections, however, where there is always a definite threshold determining the outcome, Tuck argues that the collective action problem described by Olson never arises, for rational individuals in such situations have incentives to coordinate their activity to ensure meeting the threshold (48).<sup>18</sup> Since elections do not represent a genuine Olsonian problem, Tuck concludes that "any analysis of voting which presumes that no individual vote has causal power over the result unless it is pivotal is mistaken" (44).<sup>19</sup>

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<sup>18</sup> Such coordination should in fact be relatively easy in the electoral context, as the essential organizational structure for collective action is fully in place, at least for the major political parties, and all individuals must do is obtain a ballot and cast a vote for their preference.

<sup>19</sup> One might argue that elections actually do represent an instance of the sorities paradox, at least in practical terms, because if an initial result is close enough it will often elicit a recount and/or litigation, making the actual threshold for winning uncertain. Given this reality, combined with the practical limitations of election administration, any large election with a close enough result might be described as "a statistical tie," with no identifiable threshold for when a result becomes that close (see e.g. McCaffery et al. 2004a, 5). This is not a problem for Tuck's theory, however, for he eventually concludes that even in a true sorities situation, rational behavior entails acting as if there *is* in fact a definite threshold, although it cannot be precisely identified (Tuck 2008, 95, 208; see Runciman 2008). In any event, an electoral outcome is

While Tuck provides the theoretical foundation for a new understanding of the collective action problem of voting, his analysis nevertheless stops short of a comprehensive account of the implications of efficacious set causation in the context of elections. Tuck broadly associates his position with an article by Alvin Goldman (1999) entitled, “Why Citizens Should Vote: A Causal Responsibility Approach” (see Tuck 2008, 51). Goldman echoes the idea that overdetermined causal effects can be meaningfully ascribed in cases where counterfactual causation fails, and he seems to have independently arrived at the general idea of an efficacious set of votes existing within the larger set of votes for a winning candidate (Goldman 1999, 205-207). However, neither Tuck nor Goldman fully integrates the *probabilistic* context of voting into their causal theory. Goldman indicates in a footnote, “Causation can take place even in chancy situations, where merely probabilistic laws hold sway,” yet he puzzlingly concludes, “In the context of voting, however, we do not need to worry about probabilistic causation. Wherever an electoral outcome occurs, some set of votes is sufficient for the outcome” (Goldman 1999, 208).

Similarly, while Tuck originally references the “probability that [one] vote was part of the efficacious set” (Tuck 2008, 44), he later appears to abandon this probabilistic focus in favor of an emphasis on the rationality of “bandwagon” incentives that justify participation in cases of clear overdetermination. He thus concludes, “[I]t is precisely in the situation where it looks on the standard modern view as if my vote is unnecessary that I have a good reason to vote” (60).<sup>20</sup> Strangely, he appears to entirely ignore elections in

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always at least formally determined by an exact threshold, and moreover, the practical uncertainty surrounding close elections can be modeled in a way that mirrors an exact threshold determination (Gelman et al. 2004, 674).

<sup>20</sup> Tuck again references the probability of being in the efficacious set in explaining that when one’s preference is an overwhelming favorite to win, the probability of being in that set might be small enough to justify abstention (Tuck 2008, 61). Since his primary focus is on an instrumental argument for voting in cases where one’s preference is expected to win, Tuck associates efficacious set causation with being

which the outcome may be uncertain, instead highlighting how individuals can have an instrumentally rational reason to vote even when they fully expect their preference to prevail. Tuck's point is an important theoretical innovation of its own, but it arguably misses another key consequence of the theory of efficacious set causation—the motivation it provides for individuals to participate in *close* elections. Furthermore, Tuck also neglects to discuss how his theory might apply in cases where an individual's preferred choice is expected not to win but rather to *lose*. A more comprehensive explanation of how efficacious set causation functions in these cases is needed in order to more fully integrate the probabilistic context of voting as *ex ante* decision-making. This more comprehensive explanation provides the basis for the new interpretation of *p* in the voting calculus.

#### 4) DEVELOPING THE NEW INTERPRETATION OF *P*

The probability of one vote being necessary to an election outcome by forming part of an efficacious set can be illustrated with the result of a very famous close election: the 2000 U.S. presidential race in Florida. The official final tally was 2,912,253 votes for Al Gore, and 2,912,790 votes for George Bush. Leaving the Gore voters aside for the moment, the *ex post* probability that any individual Bush voter was in the efficacious set is  $2,912,254/2,912,790$ , or about 0.9998. Prior to the election, assuming it was uncertain who would prevail in Florida, with polls showing the race to be within the margin of error (and thus “too close to call”), any prospective voter should rationally have assumed, *ex ante*, that their vote had an effectively 100 percent chance of being necessary to their

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*sufficient*, but not *necessary* to the outcome (101-102). Sufficiency, in Tuck's usage, seems to refer to collective sufficiency, not to the individual (*ceteris paribus*) sufficiency associated with casting a pivotal vote, while his version of necessity seems to imply strict—not probabilistic—necessity.



preferred outcome. In other words, every vote mattered, at least prospectively. This is presumably how campaign strategists think about close elections, and it's not clear why voters—at least those with clear preferences—should think much differently. Pivotal theory leads of course to a very different conclusion, as a negligible value for  $p$  effectively eliminates instrumental benefits in even the closest elections. Under this new interpretation, however,  $p$  can essentially be ignored in these cases.

The theory of efficacious set causation can thus justify instrumental participation in cases of close elections, as just illustrated, as well as when one's preferred choice is a favorite to win, as Tuck demonstrates in his emphasis on the rationality of bandwagon incentives. What of the case where one's preferred choice is expected to lose? If *ex ante* information predicts that one's favored candidate is essentially certain to lose (e.g., Nader voters in the 2000 election), then prospective voters should indeed rationally conclude that votes for that candidate would have zero probability of affecting the outcome. However, as the probability that one's preferred choice might prevail begins to increase, the logic of efficacious set causation takes over: Suppose that pre-election polls indicate the outcome of a two-candidate race is expected to be 45 percent for candidate X, and 55 percent for Y, leaving aside for now any margin of error. A prospective voter who prefers X might have a rational incentive to participate in this situation, since X is not certain to lose, even if that result appears more likely than not. What then is the *ex ante* probability that this voter's participation will be necessary for X to win? It seems clear that in this situation the chance that a vote for X will be necessary to the preferred outcome is 100 percent. Every vote for candidate X can be expected to be in the efficacious set in this case, because every vote is expected to be necessary in order for X to win. This is true even though *ex post*, if X happens to lose, every vote for X will have had a zero probability of forming part of an efficacious set, and will in fact have been instrumentally

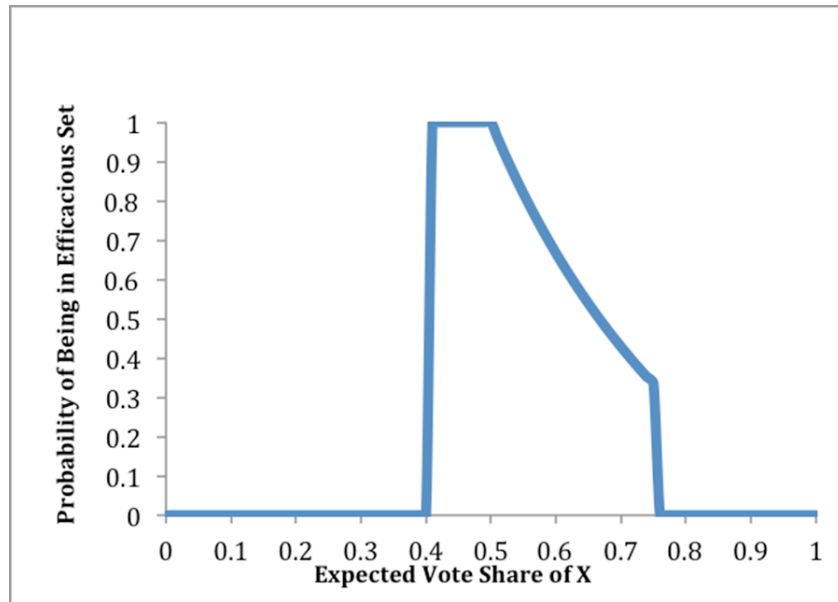
useless. *Ex ante*, however, the fact that the odds appear to be somewhat—though not overwhelmingly—in Y’s favor means that the votes of every one of X’s supporters are needed if X is to have a chance at victory, so prospective voters who prefer X should interpret  $p$  as equal to 1.

In sum, the theory advanced here suggests that a prospective voter with a clear preference between two candidates should go through a two-stage decision-making process with regard to the  $p$  term: First, the individual asks: Is there a “realistic” chance that my preferred candidate can win?<sup>21</sup> If the answer is no, there is indeed no instrumental motivation to vote. If the answer is yes, the individual then proceeds to ask: What is the chance that my vote will be necessary to that outcome by forming part of an efficacious set? If the preferred candidate appears more likely to lose, or if the election is essentially “too close to call,” then  $p$  is equal to one. If, on the other hand, the preferred candidate is expected to win, the probability of forming part of an efficacious set declines in proportion to the strength of that expectation. Tuck’s theory of bandwagon incentives indicates that calculation of this probability may continue well past the point where the preferred candidate is perceived to have any realistic chance of losing, but at some point that probability may become small enough that there could again cease to be any instrumental motivation to participate (Tuck 2008, 61).<sup>22</sup>

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<sup>21</sup> Asking whether one’s preferred candidate has a “realistic” possibility of winning implies a behavioral assumption relating to a prospective voter’s beliefs apart from objective estimations of the probability (or probability distribution) associated with the expected outcome. In other words, the answer to this question will be idiosyncratic, as discussed below.

<sup>22</sup> This implies another behavioral assumption regarding a prospective voter’s beliefs, not about whether the preferred candidate has a realistic possibility of losing, but rather about the idiosyncratic value of forming part of an efficacious set of votes for a winning candidate.



**Figure 1.1: Value of  $p$  as Expected Outcome Changes**

Figure 1.1 illustrates a simulation of the value of  $p$  in a large electorate as the expected share of votes for candidate X moves between 0 and 1. When X's expected share is small enough that the candidate is expected to lose for certain,  $p$  equals 0. However, there is a point where the expected loss of candidate X becomes uncertain, and a prospective voter begins to perceive that X has a realistic chance at winning. At this point there is a discontinuity, and  $p$  jumps from 0 to 1. Where exactly this occurs may be completely idiosyncratic, but Figure 1.1 assumes that it happens when the expected share of X rises above 40 percent. The value of  $p$  then remains at 1 until X becomes more likely to win, at which point it begins to descend, with  $p$  at each point equal to the expected number of votes for Y, plus one, divided by the expected votes for X.<sup>23</sup> As

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<sup>23</sup> One might wonder whether  $p$  should instead continue to equal 1 past the expected vote share of 0.5 until the point where X's losing ceases to be a realistic possibility. This point might be assumed to fall somewhere around 0.6, in parallel to the discontinuity point on the losing side. However, the argument here is that  $p$  should be interpreted as 1 on the prospective losing side (at all points where there is still a realistic chance of winning) only because each vote is 100 percent certain to be necessary for X to win. On the prospective winning side  $p$  is attributed a distinct value, and there is no reason to assume a  $p$  of 1. Nevertheless,  $p$  will of course be very close to 1 when X is only a slight favorite.

indicated, there is presumably another point where the expected share is so high that voting for  $X$  begins to seem instrumentally useless, and  $p$  drops to 0 even though there remains a non-zero probability of forming part of the efficacious set. Note, however, the asymmetry: Where  $X$  appears more likely to lose,  $p$  shifts from 0 to 1 when a prospective voter perceives a realistic possibility of  $X$  winning—here when the expected share rises above 0.4. Where  $X$  is expected to win, however, a prospective voter might rationally pursue a chance at joining an efficacious set up to the point where bandwagon incentives run out, which Figure 1.1 assumes to occur when  $X$ 's vote share reaches 0.75, after which  $p$  returns to 0.<sup>24</sup>

A key observation in distinguishing this interpretation of  $p$  from pivotal theory is that under this new approach the size of the electorate is effectively irrelevant in all but the very smallest elections: In other words, Figure 1.1 looks almost exactly the same whether the electorate has 100 or 100 million voters. In contrast to pivotal theory, where both closeness and size determine the value of  $p$ , what matters under this interpretation is essentially only expected closeness. Under efficacious set causation,  $p$  still equals 0 in some cases, but it may equal 1, or close to 1, when an election is expected to be highly competitive. Therefore, the perceived benefit of one's preferred choice prevailing in the election— $B$  in the calculus—need not be reflexively discounted to zero. This resolves the paradox of turnout, at least for cases of relatively close elections.

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<sup>24</sup> The chosen discontinuity points of 0.4 and 0.75 are admittedly somewhat arbitrary. The hypothesis here is that these discontinuities should exist, but obviously, empirical research is needed to verify their existence and location. On the more likely to lose side, the discontinuity might be hypothesized to fall somewhere between 0.40 and 0.45, assuming that most prospective voters would likely agree that a candidate polling over 45 percent has a “realistic” chance at winning, and the reverse at less than 40 percent. On the likely to win side, the discontinuity might be subject to greater variation based on how individuals value a chance at joining an efficacious set of votes. Note that the locations of these discontinuities could be seen as true instances of the sorities paradox, since they lack definite thresholds. Tuck's theory, however, would entail acting as if they in fact do have clear thresholds, even if they cannot be precisely identified (see *supra* n. 19).

A simple approach to calculating  $p$  as the probability of being in the efficacious set could also incorporate a margin of error from a pre-election poll, as follows: A prospective voter who favors candidate X over candidate Y (in a two-person race) would first note whether the margin of error crosses the 50 percent point. For example, polls might indicate that candidate X is expected to receive 54 percent of the vote,  $\pm 5$  percent. In this case, the probability of being in the efficacious set should be estimated at 1, since the expected outcome appears to be a statistical tie. If candidate X's predicted likelihood of winning is beyond the margin of error, the chance of a vote for X being in the efficacious set would be projected downward from 1 in proportion to the (mean) expected outcome, up to the point where the higher discontinuity falls outside the margin of error, and  $p$  drops to 0. Conversely, if X appears more likely to lose,  $p$  would equal 1 at all points where the lower discontinuity point falls within the margin of error. To illustrate, X may be expected to obtain only 38 percent of the vote, again with a margin of error of 5 points, meaning that X's expected share could really be as high as 43 percent. Arguably, it would not be beyond the realm of "realistic" possibility for a potential voter to conclude that X has a chance of prevailing in this situation.<sup>25</sup> In other words, it could well be worth the effort of voting for X, after considering expected costs and benefits, given that any vote for X in this situation is essentially certain to be necessary if X is to win.<sup>26</sup>

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<sup>25</sup> It might first be noted that most polls have a 95 percent confidence interval—meaning there is a 5 percent chance that the true value will fall beyond the margin of error (of about two standard deviations from the mean) in repeated sampling. More importantly, pre-election polls of "likely" voters measure only expressed intentions at the time surveyed, which are subject to various sources of bias, including the fact that respondents may not be very good at predicting their own likelihood of voting (Rogers and Aida 2014). As Fischer (1999, 273) explains, polls may have "non-sample errors, mainly because people do not vote the way they say they will." For these reasons, it arguably makes sense to construct another margin of error around the formal margin of error when using pre-election polls in *ex ante* instrumental turnout decisions.

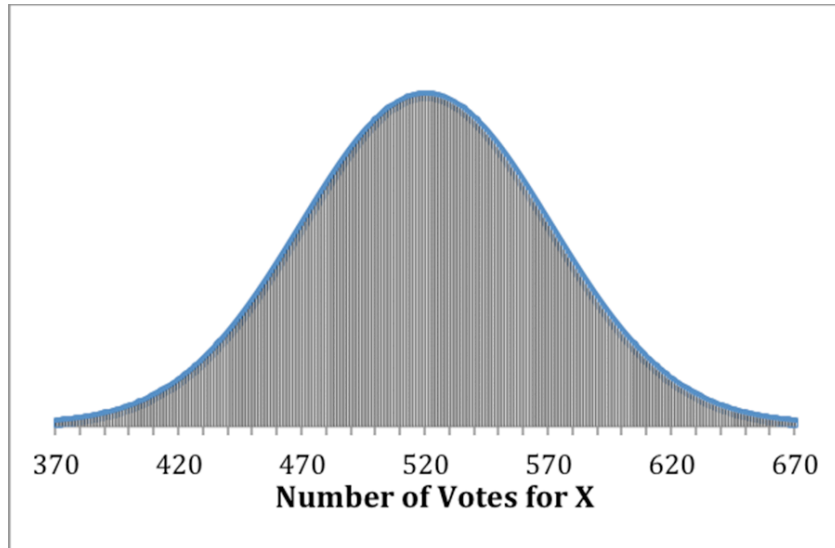
<sup>26</sup> Interestingly, there could be an interaction between the expected benefits of an individual's preferred candidate winning ( $B$  in the calculus) and the location of the discontinuities in the estimate of  $p$ . If  $B$  is perceived to be very high—for instance, when one thinks the opposing candidate will cause great societal

A more complex estimation of  $p$  can be derived by using the predictions of pre-election polls to construct a probability distribution for the expected outcome, and then summing up the probabilities for each possible outcome discounted by its associated value of  $p$ . Hypothetically, suppose a poll sampled 100 voters out of an electorate of 1000, finding that 52 individuals preferred candidate X, and 48 favored Y. In this case, candidate X would be expected to receive 52 percent of the vote with a standard deviation of about 5 percentage points.<sup>27</sup> Applied to the population of 1000 voters, the mean expectation for candidate X would be 520 votes, with a standard deviation of 50 votes, yielding the normal distribution shown in Figure 1.2:

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harm—one might consider participating even when the chance that one’s preferred candidate will win is relatively small. This perhaps suggests a logic reminiscent of minimax regret: The greater the chance for regretting a decision to abstain, the more one might want to minimize that risk by participating. When a candidate loses by a relatively small margin, supporters who abstained might be seen as having more causal responsibility for the adverse outcome (see Goldman 1999). (This of course assumes the rejection of pivotal theory, so that one might experience regret even with a margin greater than one.) The level of regret for abstaining would then presumably be greater the closer one’s preferred candidate came to winning, and the greater the strength of one’s preference for that candidate. Prospectively, therefore, one would want to minimize the possibility of “maximal” regret by regarding one’s vote as potentially necessary and participating even in cases where one’s candidate seems more likely to lose, particularly where the  $B$  term is perceived to be high. In formal terms, this could be represented by a leftward shift in the location of the lower discontinuity in the value of  $p$ . When a highly preferred candidate is favored to win, one might also experience some regret at not being part of an efficacious set, but it would not seem to be as “maximal” a regret as abstention when one’s preferred candidate loses.

<sup>27</sup> This estimation method draws from Fischer’s (1999) approach to calculating the value of  $p$  under pivotal theory. As Fischer (1999, 270) notes, in a poll for a two-candidate election (a binomial distribution), the standard deviation (in numbers of voters) is calculated by multiplying the sample size by the expected vote share of each candidate and taking the square root of the product:  $\sqrt{100 * 0.52 * 0.48} \approx 5$ .



**Figure 1.2: Probability Distribution of Votes for X in Electorate of 1000 ( $n=100$ )**

The probability that candidate X will fail to win (losing or tying) is the area under the curve representing 500 votes or less, which is calculated by the cumulative distribution function to equal 0.344 of the entire area under the curve. The  $p$  associated with this probability would be 1, as indicated previously, except for points to the left of the lower discontinuity, where  $p$  is equal to 0. Assuming that the discontinuity point is at 0.4, the probability that X will receive 400 votes or less is calculated at 0.008, which is subtracted from 0.344 to yield an overall probability of being in the efficacious set—on the prospective losing (or tying) side—of about 0.336. Summing up the probabilities where X is expected to win is more complex, since the probability of being in the efficacious set changes at each point on the curve. Therefore, probability mass functions—each representing the probability of a discrete outcome—must be calculated for every possible winning outcome.<sup>28</sup> The associated  $p$  for each of these outcomes is

<sup>28</sup> For simplicity, this can be calculated only up to 3 standard deviations above the mean, here 670 votes, since the probability of X receiving more votes becomes infinitesimal. In any event, it would be calculated only up to the point of the upper discontinuity, here assumed to be 0.75, or 750 votes.

calculated by dividing the number of votes for candidate Y, plus 1, by the number of votes for X. The value of  $p$  at each outcome is then applied as a discount factor to the discrete probability associated with each outcome. Summing up the discounted probabilities for each outcome where X receives 501 votes or more (up to 3 standard deviations above the mean) yields an overall probability of 0.543. Adding this to the 0.336 calculated on the other side of the curve yields an overall probability of 0.879 that a vote for candidate X will be in the efficacious set.<sup>29</sup>

The following formal equation represents the probability of being in the efficacious set ( $\text{Pr}_{\text{ES}}$ ) with respect to a given distribution ( $\mu$ ), where  $X$  equals the expected number of votes for candidate X (in a two-candidate race),  $N$  equals the expected total electorate, while  $a$  and  $b$  are (respectively) the lower and upper discontinuity points.<sup>30</sup>

$$\text{Pr}_{\text{ES}\mu} = \text{Pr}_{\mu} \left[ X \leq \frac{N}{2} \right] - \text{Pr}_{\mu}[X \leq aN] + \sum_{X=\frac{N}{2}+1}^{bN} \frac{(N-X)+1}{X} * \text{Pr}_{\mu}[X]$$

Figure 1.3 applies this equation repeatedly as the expected vote share of X shifts between 0 and 1, illustrating a simulation of  $p$  calculated from a probability distribution, based again on a hypothetical sampling of 100 from an expected electorate of 1000, with discontinuity points set at 0.4 and 0.75. When the expected distribution of votes is evenly divided at a mean of 0.5, the overall probability of being in the efficacious set is

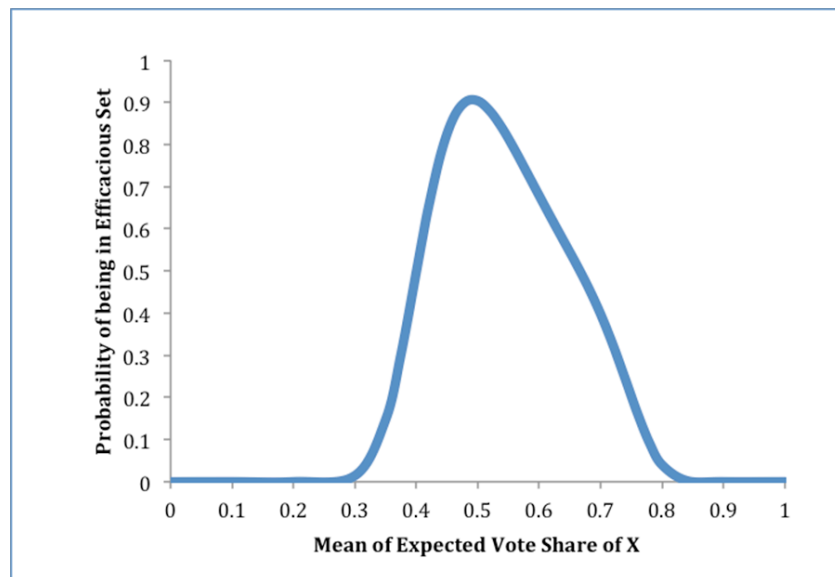
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<sup>29</sup> If  $p$  drops to zero at 0.4, the probability of receiving 400 votes or less is small enough that it does not significantly alter the final calculation. However, locating the lower discontinuity point significantly above 0.4 would produce a greater effect on the final value. If it is instead located at 0.45, the overall probability of being in the efficacious set in this example drops to 0.807. For the upper discontinuity, the possibility of X receiving more than 0.75 of the votes is essentially 0, and the discontinuity point would have to move much further down from 0.75 to have any noticeable effect on the final value of  $p$ .

<sup>30</sup> This assumes an even number of voters. If  $N$  is odd, the summation term changes to:  $\sum_{X=\frac{N+1}{2}}^{bN} \dots$



calculated at just above 0.9.<sup>31</sup> The curve is again asymmetric, dropping more steeply where X appears more likely to lose since more of the distribution is being discounted to 0 under those expected outcomes. Correspondingly,  $p$  drops below 0.5 on the left-hand side of the curve just as X's mean expected vote share reaches 0.4, and  $p$  drops almost to 0 by the time that vote share reaches 0.3; however, on the right-hand side  $p$  drops below 0.5 when X's expected share is about 0.67, and does not settle to 0 until that share is above 0.8.



**Figure 1.3: Value of  $p$  Calculated from Probability Distribution ( $n=100$ )**

To conclude, none of the foregoing is meant as a claim that prospective voters can or should go through these types of calculations in practice, just as the statistical models of pivotal theory do not necessarily imply that voters can or should explicitly calculate their chances of being pivotal. Nevertheless, the simpler methods outlined above for

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<sup>31</sup> If the lower discontinuity is instead set at 0.45, the highest value of  $p$ —about 0.81—occurs near a vote share of 0.52, while for an evenly split electorate  $p$  is about 0.77. This is perhaps conceptually problematic, since one might expect the highest value of  $p$  to always occur when the race is closest.

calculating  $p$  could perhaps be understood by most prospective voters, in contrast to even the most basic calculations required to estimate  $p$  under pivotal theory. Yet the main point for present purposes is that the alternate interpretation described here leads to a starkly different understanding of the instrumental efficacy of voting. The initial theoretical claim is thus simply that when prospective voters consider the chance of their vote affecting the outcome of an election, they *could*—consistent with instrumental rationality—consider their chance of forming part of an efficacious set instead of considering their probability of being pivotal. However, there is also a stronger normative argument that the probability of having a causal effect on an election *should* be calculated in this manner, and that employing pivotal theory might actually represent a less rational—if not outright irrational—approach to the collective action problem of voting. This normative argument has vital implications for conceptions of the role of voting in democratic theory, and it also has important consequences for the legal and policy regimes associated with elections, as discussed in the following sections.

## **5) CRITIQUE AND NORMATIVE IMPLICATIONS OF EFFICACIOUS SET CAUSATION**

In order to begin evaluating the normative implications of this new understanding of how individual votes contribute to electoral outcomes, it is helpful to review some of the critical response to Tuck's work. Notwithstanding the highly provocative nature of Tuck's conclusions—which pose a fundamental challenge to the conventional modeling of collective action problems—the response to *Free Riding* seems relatively muted. Reviews have been mixed, with some praising Tuck's innovative approach (Amadae 2008; Runciman 2008), while others respond skeptically to his argument against the Olsonian orthodoxy (Kuhn 2010; Thompson 2011; Congleton 2009). Jason Brennan

offers perhaps the most detailed criticism of Tuck's causal logic, directly addressing the theory of efficacious set causation in his book, *The Ethics of Voting* (Brennan 2011a; see also Brennan 2009).

Brennan advances several arguments against Tuck's position on the instrumental rationality of voting (Brennan 2011a, 28-34). Grounding his analysis, Brennan postulates the existence of two types of potential voters: Type-1 potential voters care not only about the electoral outcome, but they also care about being a causal agent of that outcome. Brennan's type-2 potential voters, on the other hand, care about the outcome but attribute "no special value to being the agent of causation" (29). His main argument is that abstention is the most rational choice for Type-2 individuals (who prefer candidate A), because: "Given what others are doing, voting for A and abstaining from voting for A are both sufficient for A to be elected" (33). However, Brennan never really defines the parameters of "what others are doing," and he does not mention close elections where the outcome may be uncertain. It may perhaps be understandable to miss the implications of Tuck's theory for uncertain elections, for as indicated, Tuck himself neglects to elucidate this matter. Brennan parenthetically states, "Recall that Tuck is not trying to argue that one should vote because there is some small chance one's vote will be decisive" (Brennan 2011a, 33). However, Tuck's theory does in fact imply that one should vote because—or more precisely, whenever—there is some *large* chance that one's vote will be necessary, if not "decisive," to the preferred outcome.<sup>32</sup>

In cases of uncertainty, the logic of efficacious set causation suggests that participation could be instrumentally rational—subject to the *C* term of the calculus—

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<sup>32</sup> Brennan interprets efficacious set causation as the state of being "*minimally sufficient*" for the outcome (Brennan 2011, 29), but he does not contemplate it representing the probability that one's vote might be *necessary* to the outcome. Again, Tuck is unclear on this as well, since he focuses on the case where one's preferred candidate is fully expected to win (see *supra* n. 20).

even for Brennan's Type-2 individuals. For if these individuals truly do have a preferred outcome (the value of which is not outweighed by the costs of voting), they should want to do what they can to contribute—even in a very small way—to bringing about that outcome, regardless of how much “special value” they attach to their causal effect. The difference between Brennan's two types of potential voters might instead be exhibited in the location of the upper discontinuity in the probability of being in the efficacious set: Type-2 individuals could be expected to have more symmetry between their lower and upper discontinuities, as they would not care about having a share of causal credit for their preferred outcome in cases where that outcome is fairly certain. Yet assuming they do in fact care about the outcome, they should rationally want to participate in cases where it remains uncertain. Under Tuck's approach, caring about the outcome cannot be detached from attributing value to being an agent of causation, at least in cases of uncertainty, for if one truly cares about the outcome one by definition should want to influence it to the extent within one's power. In fact, Brennan's Type-2 individual appears to assume the counterfactual conception of causation employed by pivotal theory, taking for granted the virtual impossibility of affecting any election outcome, which makes Brennan's argument against Tuck seem circular.

Some of Brennan's other objections to Tuck's theory can be resolved by incorporating the other elements of the calculus. For example, he raises the existence of opportunity costs for the act of voting as an argument against Tuck's causal logic (Brennan 2011a, 31, 33; see also Mackie 2014, 45). However, all costs associated with voting—including any costs related to missed opportunities during time spent voting—are modeled in the  $C$  term of the calculus, and they should not directly affect estimation of  $p$ , whether under pivotal theory or efficacious set causation. Brennan also states that under Tuck's theory the individual utility of voting is equal to the probability that one's

vote will be in the efficacious set, multiplied by “the value of being in the efficacious set” (Brennan 2011a, 30). He then argues that “there is no obvious way” to determine the value of being in the efficacious set, citing Tuck’s rejection of the possibility of dividing up total utility among those with causal responsibility for bringing it about (Brennan 2011a, 184; citing Tuck 2008, 40-43). However, Tuck actually concludes that “each vote carries the full causal responsibility for bringing about the result” (Tuck 2008, 41). The utility associated with the probability of being in the efficacious set is therefore simply the differential utility derived from one’s preferred candidate winning—in other words, the value of  $B$  in the calculus. While it is true that estimating the value of  $B$  raises difficult issues, this has no bearing on the logic of efficacious set causation.

Brennan also argues that Tuck’s theory is fundamentally inconsistent with instrumental rational choice, which purportedly demands the conventional Olsonian logic. Brennan thus accuses Tuck of employing a theory of “rationality as effectiveness,” in which rational action is judged by *ex post* standards of whether success was achieved, regardless of the *ex ante* odds of achievement (Brennan 2011a, 32). Tuck is admittedly somewhat unclear regarding the probabilistic context of efficacious set causation, as indicated, but Brennan’s reading is nonetheless insupportable.<sup>33</sup> Tuck clearly maintains that the logic of efficacious set causation falls within the bounds of instrumental rationality, although it obviously modifies the conventional Olsonian understanding of what constitutes a rational choice in collective action situations (see Tuck 2008, 99-100). Furthermore, the extension of Tuck’s theory to elections with uncertain outcomes, as

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<sup>33</sup> In accusing Tuck of employing rationality as effectiveness, Brennan cites Tuck’s statement that “the essence of instrumental action is, after all, that what we do is a *means* to an *end*, that is, *causes* it” (Brennan 2011, 32; citing Tuck 2008, 54). There is nothing in this quote, however, nor in its surrounding context (nor anywhere else in *Free Riding* for that matter), to indicate that Tuck endorses the concept of rationality as effectiveness, which as Brennan illustrates, leads to clearly irrational forms of decision-making.

developed here, reinforces the position of efficacious set causation within an instrumentally rational approach.

Brennan's critique helps reveal the normative implications of how Tuck's approach departs from the conventional assumptions of pivotal theory and the Olsonian view of collective action problems. Brennan submits his Type-1 and Type-2 potential voters as if they represented two equal attitudes, devoid of normative connotations. However, one might question the claim to greater rationality of the Type-2 position, where an individual desires to receive a benefit while attaching "no special value to being the agent of causation." This is of course the very definition of free riding: receiving benefits from the work of others while eschewing a contribution to the collective effort. The conventional Olsonian logic assumes that it is always most rational to have an overriding interest in trying to free ride whenever possible; hence the focus on not contributing unless one's participation is likely to be pivotal. However, it might be equally rational—or perhaps even more rational—to have an overriding interest in ensuring that a particular public good is provided, or that one's preferred candidate is elected. The theory of efficacious set causation provides a theoretical basis for questioning the conventional assumption that free riding is always the most rational response to a collective action situation, showing instead how it can sometimes be instrumentally rational to participate even in the largest of groups. In fact, the second half of Tuck's book reviews the extended intellectual history of collective action problems, demonstrating how prior to the mid-20<sup>th</sup> century the inclination toward free riding was viewed as a decidedly *irrational* response to these situations.<sup>34</sup>

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<sup>34</sup> As an example, Tuck characterizes David Hume's position on collective action problems as follows: "Psychological features, such as the propensity to think about short term outcomes, or a general ignorance of the instrumental point of collaboration, might induce people not to cooperate, but this (though understandable, and predictable on Hume's account of human character) was *an error in reasoning*" (Tuck 2008, 126, emphasis added).

In the individual turnout calculus, therefore, it may in fact make more sense—in effect be more instrumentally rational—not to discount the expected benefits associated with one’s preferred candidate (*B*) by the chance that one’s vote will be pivotal, but rather by the chance that one’s vote will be necessary to the result of an uncertain election, or might otherwise contribute to an efficacious set of votes. What then is truly the more rational approach, assuming that by rational one means optimally oriented for achieving a certain goal? It bears repeating, as Harsanyi indicates, that the designation of rationality is at root a normative judgment (Harsanyi 1986, 83; see also Zuckert 1995). Tuck likewise asserts that his argument “must be understood as a *normative* claim, and not at all (or at least not much) as a predictive claim about how human beings will as a matter of fact behave” (Tuck 2008, 111). Furthermore, pivotal theory sets a normative standard for rational behavior that has implications not just for voting, but also for collective action problems more generally. It is thus certainly worth questioning whether pivotal theory sets the best normative standard for how individuals should behave.

The standard of pivotal theory eliminates the value of very small effects by framing them as negligible and hence inconsequential. In normative terms, however, even imperceptible effects can matter greatly to ultimate outcomes. As noted previously, Derek Parfit (1984, 70) refers to the devaluing of small effects as a “mistake in moral mathematics.” The implications of efficacious set causation for the ethics of imperceptible effects may thus apply in many areas beyond voting. For example, this discussion may be relevant to the question of whether individuals can rationally justify minor contributions to environmental degradation on the basis of negligibility. In contrast to pivotal theory, which would endorse what seems like antisocial behavior in such cases, the rational standard set by efficacious set causation is more socially oriented, taking into account the collective effect of many individual causal acts. As Tuck makes clear, this is

not a standard meant to apply regardless of what others are doing; it explicitly accounts for the anticipated activity of other individuals (Tuck 2008, 207). In a sense, this echoes Grafstein's (1991) "evidential" theory of turnout described earlier, in which individuals base their actions on expectations regarding the behavior of others. It might thus also help vindicate the rationality of "everyday Kantianism," which Elster (1989) criticizes as a form of magical thinking. Similarly, it might not be a completely irrational "illusion" to incorporate diagnostic contingencies into the causal logic of voting, as Quattrone and Tversky (1988) assert.

The movement away from pivotal theory can also be seen as part of a larger shift in recent scholarship away from conventional rational choice theory, and toward what Pildes and Anderson (1990, 2214) call, "a socially-situated understanding of individual and collective rationality" (see also Monroe 2001). Proponents of this shift have argued that theories of rationality have real-world implications, as normative standards for rational choice can have practical effects on how people behave. Pildes and Anderson thus suggest that academic adherence to conventional rational choice theory "might promote resignation, complacency, or at worst, a longing for antidemocratic politics" (2214). Similarly, Lars Udehn argues that the economic approach to collective action influences public attitudes, stating that "people become more egoistic by being told that this is what they are" (Udehn 1996, 194). Tuck himself reaches the identical conclusion, asserting that "the prevalence in modern economics and political science of the idea that it is not instrumentally rational to collaborate in large groups may well have led people to adjust their conduct accordingly" (Tuck 2008, 115).<sup>35</sup>

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<sup>35</sup> In addition, at least two experimental studies have found that exposure to pivotal voting theory leads to more negative attitudes toward participating in elections (Brunk 1980; Blais & Young 1999). Blais & Young find that such exposure reduces actual turnout among college students.



It may therefore be especially troubling when prominent economists or economically oriented political scientists cite pivotal theory as a compelling reason against participating in elections. For just a prominent example, the widely-read “Freakonomics” column by Stephen Dubner and Steven Levitt in *The New York Times* implies that economists should be embarrassed to be seen in a voting booth, and that the reason much of the general public does vote is possibly because “we are just not very bright and therefore wrongly believe that our votes will affect the outcome” (Dubner and Levitt 2005). Similarly, the following exchange took place just before the 2012 presidential election on Dubner and Levitt’s radio program:

Dubner: So Levitt, how can you...tell the difference between a smart person and a not so smart person?

Levitt: Well, one good indicator of a person who’s not so smart is if they vote in a presidential election because they think their vote might actually decide who wins (Dubner and Levitt 2012).<sup>36</sup>

The theory of efficacious set causation provides an effective counterpoint to such encouragement of abstention, setting what is arguably a better normative standard of rationality, not only for participating in elections, but for contributing to collective action more generally. Moreover, beyond these broad normative implications, this new interpretation of how individual votes contribute to electoral outcomes has important consequences for how particular theories of democracy are translated into electoral institutions, as discussed next.

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<sup>36</sup> See also the pre-election blog posts in support of Dubner and Levitt’s position by Phil Arena (2012), and Kindred Winecoff (2012); but see the response to Dubner and Levitt by Andrew Gelman (2012), citing his work with Edlin and Kaplan explaining that voting can be rational if one assumes an altruistic interpretation of  $B$  in the calculus (Edlin et al. 2008). The  $B$ -based explanation of the paradox is not inconsistent with the  $p$ -based resolution proposed here, but note that the logic of efficacious set causation could apply even with purely self-interested preferences.

## 6) IMPLICATIONS FOR ELECTION LAW AND POLICY

As noted in the introduction, design choices for electoral institutions are linked to core principles in democratic theory, as election laws and policies reify interpretations of democracy in particular legal and administrative contexts. Two areas in which this practical implementation of democratic ideals may take place are discussed in this section, the first relating to participatory democratic theory, and the second relating to competitive theory. Without deeply engaging the extensive literature in these wide-ranging schools of democratic thought, it is possible to outline how the interpretation of individual causation in voting reflects on “the law of democracy”<sup>37</sup> and its institutional manifestations from the broad perspectives of these two theoretical approaches.

The paradox of turnout that emerges from pivotal voting theory represents a serious challenge to participatory theories of democracy, with potentially important consequences for how elections are structured. To begin, McCaffery, Crigler, and Just, in discussing the prospects for electoral reform in the United States, seem largely dismissive of the possibility for major reforms based in participatory theory, concluding that “Downs’s paradox lives” (McCaffery et al. 2004b, 232). When individual votes are viewed as only infinitesimally likely to have a causal effect on the outcome, it is presumably more difficult to endorse a position in democratic theory that places a high value on participation. Consequently, the new interpretation of  $p$  offers needed support to participatory theory, and it provides a stronger foundation for electoral reforms based in this school of democracy.

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<sup>37</sup> The term is borrowed from the title of the noted election law casebook by Issacharoff, Pildes, Karlan, and Persily (2016).

Strengthening the theoretical foundations of participatory democracy could thus provide guidance in analyzing election law cases of the type Daniel Tokaji calls the “new vote denial,” which assess the constitutional validity of various administrative burdens on casting a vote (Tokaji 2006).<sup>38</sup> The issue of voter identification has become a flashpoint for debate in this area, though many other administrative procedures are also implicated, including registration requirements, provisions for absentee or early voting, and various other voting regulations and polling practices. As mentioned in this chapter’s introduction, while there is a general consensus that courts need better theoretical guidance for analyzing and deciding these cases, there remains disagreement as to what exactly that guidance should entail. The perhaps dominant approach traces to the work of Issacharoff and Pildes (1998) advocating a turn to “structuralism” in election law. Structuralists argue that burdens on the right to vote should not be analyzed through the conventional individual rights and equal protection modes of analysis, which involve balancing the rights of individuals against state interests served by burdensome election regulations. Instead, structuralists argue that courts should assess the aggregate effects of these regulations across population groups (Elmendorf 2008; Overton 2007), shifting the analytical focus to the “structural mechanisms for monitoring the proper operation of a constitutionalized system of representative democracy” (Gardner 2010, 457; see also Stephanopoulos 2014).<sup>39</sup>

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<sup>38</sup> For Tokaji, who builds upon on a voting rights typology originally proposed by Pamela Karlan (1993), the “new” vote denial cases signal a return to the jurisprudence of participation that characterized the early voting rights cases, before a shift toward aggregative interests emerged in later cases alleging collective vote dilution rather than individual vote denial (Tokaji 2006, 692, n. 15). More recent cases, like those concerning voter identification, are thus seen as returning the focus to the individual participatory interest in casting a ballot, as opposed to the emphasis on group interests implicated in earlier challenges to methods of aggregation in electoral districts (718).

<sup>39</sup> Stephanopoulos’ theory of representational “alignment” between the preferences of the median voter and the election outcome can be associated with participatory theory to the extent that his approach is concerned with electoral regulations causing a divergence between the actual and the eligible median voter (Stephanopoulos 2014, 325). Likewise, one might worry that interpreting *p* in terms of pivotal theory

Other scholars, however, continue to endorse the traditional individual rights and equal protection analysis (Hasen 2003, 139), and particularly for deciding cases of vote denial (Fishkin 2011). In his extensive treatment of the theoretical foundations of voting rights, Joseph Fishkin sets forth requirements for deciding these cases:

This enterprise demands a more carefully specified account of why, and in what way, the individual right to vote matters.... To distinguish more severe burdens from less severe ones, and to develop precedents for deciding when such burdens outweigh state interests, courts will need to make at least implicit use of a theory of vote denial: a theory that tells us in what way(s) disenfranchisement harms individuals (Fishkin 2011, 1332).

Fishkin associates rational choice theory generally with the structuralist approach, pointing out the challenge pivotal theory poses to an individual rights analysis (1333). The practical significance of this point is well illustrated by the appellate court decision of Judge Richard Posner in the voter ID case ultimately decided by the Supreme Court, *Crawford v. Marion County Election Board*.<sup>40</sup> In finding that the State of Indiana's photo-identification requirement did not impose an impermissible burden on the constitutional right to vote, Judge Posner writes, "The benefits of voting to an individual voter are elusive," parenthetically adding that "a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are

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affects turnout decisions in a way that causes such divergence. Stephanopoulos indicates that participation is a structural value (297); however, it can also be relevant to an individual rights approach, for as Farber (2004) indicates, structural and individual rights concerns are often implicated simultaneously. Note that the pivotal situation associated with the vote choice of the median voter, which emerges from the arrangement of individual preferences in relation to candidate positions, is different from the pivotal situation in the turnout decision. In the turnout decision, as indicated, no one individual can ever be solely pivotal, but in the context of vote choice, the one pivotal voter with median preferences can be precisely identified, at least in theory.

<sup>40</sup> 553 U.S. 181 (2008).

never decided by just one vote.” Judge Posner then proceeds with a structural analysis of the case, reasoning that “the fewer the people harmed by a law, the less total harm there is to balance against whatever benefits the law might confer.”<sup>41</sup> Fishkin criticizes this structuralist reasoning, maintaining that the right to vote should be enforced more strictly at the individual level in cases alleging vote denial. He thus articulates a detailed normative argument—based in the historical development of conceptions of equal citizenship and a resulting “dignitary harm” in disenfranchisement—that a voting regulation could be unconstitutional even if it unduly burdens only *one* potential voter (Fishkin 2011, 1296, 1357).

Fishkin makes a forceful argument, but the logic of efficacious set causation provides an additional—and arguably more fundamental—basis for valuing and protecting the individual interest in casting a vote. Moreover, this new interpretation of *p* shows that the rational choice approach need not lead inexorably to a purely structuralist theory of voting rights.<sup>42</sup> The strengthening of participatory theory that emerges from the rejection of pivotal theory provides a straightforward justification for stricter scrutiny of regulations that potentially infringe on the right to vote at the individual level. Individual votes can and do have instrumental effects on election outcomes, and they should be deserving of protection on this basis alone. This does not mean that instrumental

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<sup>41</sup> *Crawford v. Marion County Election Bd.* 472 F. 3d 949, 951-952 (7th Cir. 2007). In affirming Judge Posner’s decision, the Supreme Court in *Crawford* (2008) utilized mainly the traditional individual rights versus state interests balancing test, although the majority opinion also invoked elements of structural analysis by questioning the overall number of individuals who would be affected by Indiana’s voter ID law (see Fishkin 2011, 1330). Judge Posner has since appeared to repudiate the result of his 2007 opinion upholding Indiana’s ID law (see Schwartz 2013), but there is nothing indicating his disavowal of the structuralist approach or the principles of pivotal theory (see Bauer 2013; also see Judge Posner’s dissent from denial of *en banc* rehearing in *Frank v. Walker* WL 5326463 (7th Cir. 2014)).

<sup>42</sup> Fishkin cites Judge Posner’s dismissive attitude toward voting costs—holding that potential voters who fail to clear administrative hurdles in the voting process simply “disenfranchise themselves”—as typical of the rational choice voting model (Fishkin 2011, 1337). However, it may in fact be unnecessary to assume that a rational choice approach inevitably supports what Fishkin calls the “formal” conception of the right to vote expressed by Judge Posner, as opposed to the more “substantive” conception advocated by Fishkin.

motivations are sufficient to fully embody the individual interest in voting, as expressive motivations might conceivably predominate, even in highly competitive elections. However, there is no reason to assume that instrumental rationality is wholly antagonistic to the participatory approach of individual rights protection, so it seems less necessary to resort to Fishkin's conception of dignitary harm to justify more rigorous protection of the right to vote at the individual level. Voters need no longer be viewed as "little more than worker bees" (Gardner 2010, 462), but can instead claim their fair share of democratic sovereignty as bearers of authentic agency and influence over the outcomes of elections. It accordingly becomes more difficult to maintain the view that voting rights do not merit robust protection at the individual level.

The second area of law and policy relevance relates to the competitive school of democracy. Competitive theory is often identified with the minimalist approach of Joseph Schumpeter, who famously held that elections are merely officially sanctioned competitions for power and authority, and democracy is essentially just a non-violent mechanism for resolving the practical problem of who should govern (Schumpeter [1942] 2003). However, Schumpeter's minimalism is given added substance in the work of more recent competitive theorists like Ian Shapiro, who holds up Schumpeterian competition as a model for structuring political institutions in a way that limits forms of domination—hardly a minimalist enterprise (see Shapiro 2003, 51).<sup>43</sup>

The new interpretation of *p* is naturally in harmony with competitive theory insofar as individual votes become more likely to form part of an efficacious set as

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<sup>43</sup> It is often assumed that competitive theory is fundamentally inconsistent with participatory theory. This assumption is based on the work of early competitive theorists like Schumpeter, who clearly seemed quite cynical about the value of mass participation (see Fishkin 2009, 69; see also McCafferey et al. 2004a, 9–11). However, under an updated interpretation of competitive theory—like Shapiro's—these two approaches to democracy are not necessarily inconsistent, and a joining of the participatory and competitive strands of theory may in fact be perfectly coherent.

elections become more competitive. When potential voters perceive a race as clearly uncompetitive, although many voters on the expected winning side could still have instrumental reasons to participate, those on the prospective losing side might see themselves as effectively disenfranchised, with their votes again becoming as instrumentally useless as under pivotal theory.<sup>44</sup> This, to an extent, is perhaps unavoidable in a majoritarian electoral system; nevertheless, the new interpretation of *p* draws attention to reforms designed to ensure that more elections feature true competition, so greater numbers of prospective voters face a high *ex ante* likelihood of having an instrumental effect on the outcome. Empirical evidence is largely consistent with the prediction that individuals are more likely to vote when elections are perceived as competitive (Blais 2000, 60; Blais 2006, 119).<sup>45</sup> The value of competition, however, involves more than just voter turnout at the individual or aggregate levels; it entails a *structural* concern with democracy. This is the central point of Issacharoff and Pildes (1998), who argue that representational democracy requires robust competition, and courts should intervene when necessary to “destabilize partisan lockups” of the

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<sup>44</sup> Justin Buchler contests the value of competition in democratic elections, and one of his primary arguments is that closer elections yield less “representative” government, since they result in larger numbers of individuals in the minority who voted on the losing side of the election (Buchler 2011, 26). However, the situation of voters who end up on the losing side of a fairly close election does not seem akin to disenfranchisement, since these voters had a chance at winning, but simply failed to reach a majority (or plurality). On the other hand, when *ex ante* it’s clear that one’s preference has no hope at all of winning, it arguably is more problematic from a perspective of representational theory, because it appears to be—if not an actual disenfranchisement—at least a clear case of disempowerment. The theoretical value of competition under majoritarian (and primarily two-party) democracy thus seems tied to how it ensures a realistic chance that one’s preference might prevail, which of course provides the chance to gain power at some point over the longer term, and not remain a permanent minority.

<sup>45</sup> Blais’s 2006 study is based on a meta-analysis of 32 previous studies, 27 of which found a causal relationship between closeness and turnout. Blais comments on the relationship as follows: “This is the most firmly established result in the literature. I cannot see how this finding could be wrong” (Blais 2006, 119). But see Cann and Cole (2011), finding that the increase in turnout in competitive states during U.S. presidential elections is not a direct result of competition, but rather reflects mobilization effects. Cann and Cole attribute the apparent lack of a direct turnout effect to the workings of pivotal theory (351), but it might instead point to the predominance of non-instrumental motivations for voting.

democratic process. The structuralist approach of competitive theory is thus particularly appropriate for analyzing cases that allege unfair partisan gerrymanders of legislative districts.<sup>46</sup>

This is another area where scholars see a need for greater clarity on foundational democratic theory in order to better guide law and policy (see e.g. Ortiz 2004). The Supreme Court has held that allegations of partisan gerrymanders are justiciable (*Davis v. Bandemer*),<sup>47</sup> and that excessive partisanship in drawing congressional districts can be unconstitutional (*Vieth v. Jubelirer*),<sup>48</sup> but the Court has been unable, or unwilling, to formulate a standard for when a particular districting scheme should be struck down (see Berman 2005).<sup>49</sup> Issacharoff has taken the lead in employing competitive theory to argue that partisan gerrymandering should be prohibited, and he advocates a bright line rule that would mandate institutionalized non-partisanship in the drawing of districts (Issacharoff 2002). In his words, the harm of gerrymandering is that it results in a “constriction of the competitive processes by which voters can express choice” (600). Similarly, Pildes writes of how “the constitutional violation [of partisan gerrymandering] lies in the structural harm to representative self-government” (Pildes 2006a, 271).<sup>50</sup> The essential principle

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<sup>46</sup> Note that even Joseph Fishkin endorses the use of structural analysis for deciding cases where the aggregate effects of electoral law and policy transcend individual interests, like cases of gerrymandering and vote dilution (Fishkin 2011, 1305; Fishkin 2012, 1893; see also Charles 2007, 651).

<sup>47</sup> 478 U.S. 109 (1986).

<sup>48</sup> 541 U.S. 267 (2004).

<sup>49</sup> Although the Court has criticized partisan gerrymandering for violating principles of fairness and equality, it does not appear to have specifically embraced a democratic value of competition (see Stephanopoulos 2013, 677).

<sup>50</sup> Nathaniel Persily argues that a concern for competition seems more fitting to an individual rights than a structuralist approach, since lack of competition reduces the chance that an individual might cast a “tie-breaking vote that will decide the election” (Persily 2002, 678 n. 98). This is conceptually problematic, since the chance of casting a pivotal vote in a very large election is essentially zero even with perfect competition. In any event, the theory of efficacious set causation arguably reflects a more structural perspective on competition, since individuals look to the chance that their one vote will be aggregated into a larger set of winning votes, as opposed to calculating whether their vote might prove individually decisive.



states that if citizens are to fully exercise their democratic authority as collective sovereigns, they should have some realistic chance at electing their preferred representatives, which (at minimum) implies the existence of competitive elections. Interpreting  $p$  in terms of efficacious set causation, which allows levels of competition to produce meaningful variation in the instrumental motivation for voting, thus helps reinforce opposition to partisan gerrymanders from a structuralist perspective.

This is not to argue that increasing competition should be the only—or even necessarily the overriding—factor in drawing districts, but it strongly supports the notion that competitive theory is worthy of increased doctrinal emphasis. The problem of gerrymandering is complex and contentious, both normatively and empirically. Nevertheless, the theory of efficacious set causation provides encouragement to arguments for judicial intervention to ensure that districts are not intentionally and systematically drawn to be clearly uncompetitive. More substantively perhaps, this new understanding of how individual votes contribute to electoral outcomes might support arguments for laws requiring districting schemes that aim to intentionally increase competition, at least to the extent consistent with other representational values. Moreover, the proposed model for interpreting  $p$  implies that districts need not be drawn that highly competitively in order to provide an instrumental motivation for voting, but rather just enough to ensure that prospective voters on the more likely losing side perceive a “realistic” possibility of prevailing.<sup>51</sup>

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<sup>51</sup> The competitive aspect of this new interpretation of  $p$  could also have implications for thinking about U.S. presidential elections. While the Electoral College leads to competition being concentrated in only a few “swing” states, a national popular vote would distribute competition more widely, at least when the race is relatively close at the national level. Like partisan gerrymandering, however, the Electoral College raises complex issues beyond the current scope, and while it may be problematic from the perspective of competition, it may (or may not) serve other important purposes.

## 7) CONCLUSION

This chapter has described and developed an arguably more plausible and normatively superior alternative to the conventional interpretation of  $p$  in the rational choice calculus of voter turnout. The theory of efficacious set causation, based on the pioneering work of Richard Tuck, provides an instrumentally rational justification for individuals to participate in large elections, credibly resolving the so-called paradox of voter turnout. Rejecting pivotal voting theory and restoring the potential for instrumental value in voting has been shown to have major normative implications for the rationality of participating in elections and collective action efforts more generally. The new interpretation of  $p$  also provides support to arguments from participatory democratic theory calling for stricter judicial scrutiny of procedural burdens on the individual right to vote, and it can contribute as well to a proposed jurisprudence of partisan gerrymandering based in competitive democratic theory.

Nonetheless, this chapter potentially just scratches the surface of the deeper significance of this transformational approach to voting and other collective action situations. This work is intended to form part of the broader ongoing critique of rational choice theory, even though this work employs that theory's own terms in the turnout calculus, and it aims at redefining the meaning of rational choice rather than supplanting the theory entirely. Hopefully, this might contribute to progress in the wider debate on the nature of rationality while at the same time helping to define a better conceptual framework for the motivating factors of voter turnout. As stated previously, the argument here is not meant to imply that turnout is ever fully explained by instrumental motivations. Individuals may also derive significant expressive, or otherwise non-instrumental benefits from participating in elections, as represented by the  $D$  term of the calculus, and furthermore,  $p$  may often still be equal to zero even under this new

interpretation. The objective here has been merely to rescue instrumental motivations from the theoretical abyss created by the counterfactual causal logic of pivotal voting theory. Much more analysis is needed to parse the distinctions between instrumental and expressive motivations in theory and in practice, as discussed in the following chapters.

The argument of this chapter could provide a provocation to empirical research, as the theoretical model described above leads to specific hypotheses about voting behavior that could be tested to confirm or deny the theory's validity. First is the basic question of whether individuals ordinarily (or ever) think in terms of efficacious set causation when (or if) they consider the chance that their vote will affect an election outcome, or whether they more commonly think in terms of pivotal theory. Furthermore, if individuals do think in terms of efficacious set causation, they may or may not assign greater instrumental value to being on the winning side of an election, as predicted by Tuck's theory of bandwagon incentives.<sup>52</sup> In addition, pivotal theory predicts an "underdog effect" due to the strategic context of a majoritarian election, with higher turnout among the prospective minority than those expecting to be in the majority (see e.g. Levine and Palfrey 2007; Morton and Tyran 2012).<sup>53</sup> In contrast, the theory of efficacious set causation predicts that voters on the prospective winning side will overall have more motivation to participate, although in close elections the incentive could be

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<sup>52</sup> For a possible confirmation of Tuck's theory, see Howell and Justwan (2013), who unexpectedly find that among those on the losing side after an election, satisfaction with the democratic system is unaffected by the electoral margin, while satisfaction among those on the winning side decreases for wider margins. This is perhaps consistent with the logic of efficacious set causation and bandwagon effects, since on the losing side, where the *ex post* probability of having been in the efficacious set is always zero, the margin of victory should be irrelevant, while on the winning side, where that probability is almost 1 for very close elections and then decreases gradually, margins of victory should matter more.

<sup>53</sup> Given costly voting, in equilibrium prospective voters on the expected winning side reduce their likelihood of participation, while those on the expected losing side increase their likelihood (see Morton and Tyran 2012, 10). Mackie indicates that his theory of the mandate value of voting also predicts that voters on the prospective losing side will be more likely to participate (Mackie 2014, 66); however, it is not clear why voters on the prospective winning side might not be equally motivated to increase the perceived mandate of their party or candidate.

somewhat higher for those deemed (slightly) more likely to lose, given that  $p$  equals one for those prospective voters. This also raises questions about the existence, and typical locations, of the hypothesized discontinuities in the proposed model for calculating the value of  $p$ , as well as more basic questions about how different values of  $p$  might be perceived and acted upon in practice.

Beyond these empirical issues, however, the normative and policy implications of this chapter are important on their own. Moreover, as noted in the introduction to this chapter, the interpretation of  $p$  affects how the other elements of the voting calculus are interpreted, and this new understanding of how individual votes contribute to election outcomes thus paves the way for a wider research agenda that better accounts for the varying individual and institutional factors that influence voter turnout. Fundamentally, the conception of the role of an individual voter in a large election is an essential element of democratic meaning under modern conditions of mass representation. This work aims to defend the much-maligned value of electoral participation under these conditions, and to thereby assist in development of the critical links between the theories and practices of democratic elections.

## **Chapter Two: The Ethics of Rational Choice and the Instrumental Benefits of Voting**

“To vote or not to vote is all the same.”  
–John-Paul Sartre (1977, 209)

“Perhaps some degree of suffering is ineradicable from human life, perhaps the choice before man is always a choice of evils...”  
–George Orwell (2000 [1944], 244)

### **1) INTRODUCTION**

What good is voting? More formally, what are the individual-level expected benefits of participating in elections for democratic representation? This is a complex question fraught with both empirical and normative difficulties. From an empirical perspective, there is enormous potential variation in the perceived (*ex ante*) utility of voting. In any given election, some individuals might attach momentous value to the outcome and expect a potentially high benefit from participating, while others could believe the outcome matters little or not at all, leaving them with no instrumental motivation for participating. The nature of the electoral office at stake is another possible source of variation, as an individual who anticipates a potential benefit from the outcome of a high-profile contest might see little or no value to voting in a race further down the ballot. More broadly, the perceived utility of voting may also be related to the institutional context of democratic representation, including factors such as electoral system design, the structure of party competition, and ballot access rules. Furthermore, prevailing political conditions and even general cultural trends can influence how the value of voting is perceived, in general or in any specific election. So it is difficult even

to clarify exactly what it means to empirically inquire into the prospective benefits of electoral participation.

The difficulties are only compounded in seeking a conceptual grasp on the benefits of voting from the perspective of normative democratic theory. There is fundamental disagreement and even confusion about the value of participating in the mass elections of modern democracies. What is truly at stake in these formalized mechanisms for choosing political representatives? Do elections in fact embody forces of momentous weight involving the coercive power of the state and the management of potentially violent social conflict (e.g. Adams 2009)? Or are elections in fact more often a form of political theatre characterized by illusion and misdirection, with the ballot serving as a weak and effectively worthless gesture toward the ideal of popular sovereignty, working to conceal the true governing power that resides beyond democratic control (e.g. Crouch 2004)?<sup>1</sup> Particularly given the political consequences of rising economic inequality in the United States, some democratic critics have come to see elections in this country as “essentially a sideshow with policy manufactured elsewhere” (Erikson 2015, 24). Regardless of which of these characterizations comes closer to the truth, this inquiry points toward a more basic question in analyzing the benefits of participating in elections: What are the normative foundations for ascriptions of value in the act of voting?

Modern democracies provide many different avenues for political participation, and assessments of the efficacy of voting relative to other means of engagement can affect evaluations of voting’s benefits. Participatory theorists, who might be expected to lend support to the potentially widespread act of voting, may instead exhibit skepticism

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<sup>1</sup> See also Fenster’s (2005, 374) description of Murray Edelman’s view that “politics doesn’t matter, since the state, captured by a small set of interests, persuades its citizens of its value through the management and exploitation of legitimating symbols.”

about the value of mere participation in elections without a broader base of democratic engagement (e.g. Pateman 1970). Similarly, deliberative theorists may tend to view electoral choices as insufficiently reasoned and thus inadequate as a basis for legitimate democratic decision-making (e.g. Fishkin 2009). On the other hand, some democratic theorists emphasize how choices of political representation may in fact have hugely important practical consequences (e.g. Beerbohm 2012). At the minimum, elections can be seen as non-violent means of resolving the struggle for political power (Schumpeter 2003 [1942]), which implies that the outcomes of these competitions for authority and leadership may carry significant potential for benefit or harm. More expansively, the idea exemplified by the common political refrain that “elections matter” reflects a belief that there are important public policy implications associated with participation in elections (e.g. Hill and Leighley 1992). The potential utility—or disutility—that may be brought about through voting could thus be quite high, not only at the individual level, but also for groups, societies, and possibly even the entire planet. From this perspective, it becomes clear that profound moral issues may be implicated in voting decisions. Normative political theorists may therefore choose to emphasize how voters should exercise due care and caution in their decision-making given the gravity of the potential consequences of electoral outcomes (e.g. Brennan 2011a). The perceived benefits of voting are thus intimately entwined with ideals of popular sovereignty and conceptions of democratic ethics, and with issues relating to how these ideals and ethics are implemented in practice.

To aid in addressing these challenges, this work focuses on contemporary American elections. This designates a context of majoritarian institutions and primarily two-party politics, regulated under particular legal-administrative regimes, having a distinctive—though heterogeneous—political culture, and a federal constitutional design

with significant decentralization of governing authority. The limitation to American elections obviously still leaves room for enormous variation in the perceived benefits of voting, but this provides at least some boundaries to the inquiry. The remaining complexity is addressed by employing the framework of the rational choice calculus of voter turnout ( $pB - C + D$ ) to model the individual decision to vote or abstain in a particular election. This allows for conceptually isolating the expected instrumental utility of voting ( $B$ ) from other factors that may influence turnout decisions, and it thereby provides a foundation for classifying various attitudes toward the value of voting and assessing the primary motivations for participation or abstention.

The issues raised by this exploration of the benefits of voting are vital to both democratic theory and practice. To be clear, this approach does not directly address fundamental disagreements about democratic meaning, although it does formulate an analysis and argument that may be more relevant under certain theoretical approaches, as discussed below. More broadly, this work interrogates some of the prevailing ideas and assumptions about the instrumental value of voting, and it suggests a new interpretive focus that may yield important insights into how and why individuals decide to vote or abstain. This approach will be shown to have practical significance not only for turnout decisions, but also for vote choice, as well as potentially broad policy implications for the institutional structure of elections. Distinguishing and clarifying the expected instrumental benefits of voting is thus a crucial part of assessing the general motivations behind voter turnout. Furthermore, by paving the way for studying expressive (or otherwise non-instrumental) benefits, as well as the costs of electoral participation, this work forms a key portion of a more expansive critical evaluation of the theory and practice of electoral democracy in the United States and elsewhere.



Section 2 introduces and explicates the *B* term of the turnout calculus and reviews some of the main ways it has been construed in the normative and empirical literature on voting. Section 3 outlines the new interpretative focus for the instrumental value of voting through a classification and analysis of three primary attitudinal motivations behind *B*-related abstention: indifference, alienation, and ambivalence. True instrumental indifference is most commonly associated with lack of information about the options on the ballot. The motivations behind alienation are more complex, and this section first distinguishes between expressive alienation and its instrumental consequences in creating functional indifference, which leads to discussion of both the rationality and the ethics of voting for lesser evils, and the possibility of a moral obligation to participate even under conditions of extreme alienation. This section continues by exploring the problems of ambivalence in the face of conflicting political ideals or motivations, focusing on the ethical dilemmas that arise when elections pose particularly hard choices, whether between perceived goods, perceived evils, or between instrumental motivations to vote and expressive reasons to abstain. Section 4 then discusses some implications for election law and policy in addressing the attitudes that lead to *B*-based abstention, while Section 5 summarizes and concludes with some thoughts on the potential value of voting even in an admittedly imperfect political system.

## **2) ASSESSING THE INSTRUMENTAL BENEFITS OF VOTING**

In the rational choice calculus of voter turnout, *B* represents the utility that a potential voter may expect to gain if the individual's preferred candidate should win the election. In their canonical work formalizing the turnout calculus, William Riker and Peter Ordeshook explain how the multiplication of *p* by *B*—but not by *C* or *D*—reflects a

logical distinction between expected utility (or disutility) that is dependent on the result of the election, and any expected utility that may subsist in the act of voting independent of the outcome (Riker and Ordeshook 1968, 27). This is the foundation for conceptually isolating the instrumental benefits of voting—represented by  $B$ —from what are typically termed expressive benefits—represented by  $D$ , as well as from the costs of voting, represented by  $C$ .<sup>2</sup>

Anthony Downs initially formulated the benefits of voting as the “expected party differential,” defined as the prospective voter’s expectation of difference in utility between the candidates in a two-party system (Downs 1957a, 39). Downs’ detailed explanation of how to compute this differential drifts into complexities, but his fundamental point is a simple one: In determining the benefits of voting, a rational decision involves two discrete utility calculations, as prospective voters must separately predict the benefits they expect to derive from each party in order to assess the difference. The turnout decision is thus modeled not simply as an assessment of expected utility from one’s preferred party prevailing in the election; rather, the decision also requires assessing one’s utility should the other party win. Calculating the benefits of voting thus always involves a comparison of (at least) two options, and  $B$  in fact represents an expectation regarding relative rather than absolute utility. The implications of this are explored further below, but for now, an arithmetic consequence of this notion is as follows: Note that since the value of  $B$  results from a subtraction of two utilities, the result will be positive even when the two utilities are negative (i.e., disutilities). In other words, even if a prospective voter happens to deeply detest each of the candidates in a

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<sup>2</sup> Riker and Ordeshook note that in theory there may also be instrumental costs, or costs that are dependent on the outcome, which should therefore also be multiplied by  $p$ . As an example they point to the possibility that an employee may expect to suffer increased reprisal from an employer as a result of a closer election outcome (27). They opt to ignore these types of costs due to their presumed idiosyncrasy, but in any event such costs could be conceived as negative utility in  $B$ .

two-person race, there could still be an instrumental benefit to voting if the aversion toward one candidate is significantly less than the other.

For several possible reasons, there appears to have been much less attention in the voting literature to  $B$  than to the other elements of the calculus. The most prominent reason is presumably the alleged discounting effect of  $p$ , which represents the probability that an individual vote is expected to causally influence the election outcome. The value of  $p$  is conventionally interpreted as so vanishingly small that multiplying it by  $B$  effectively reduces  $pB$  to zero regardless of how important the result of an election might be to an individual. This is the basis of the so-called paradox of voter turnout, which underlies the commonly held belief that voting in a large election with the goal of affecting the outcome is never rational, since the instrumental benefits of participation are always essentially nil (e.g. Owen and Grofman 1984; Aldrich 1997, 378). Yet another reason for the lack of attention to  $B$  may be that its assessment is highly subjective, with no clear way to objectively determine what its value is, much less what it should be.<sup>3</sup> Furthermore, questions of how political parties or elected officials are viewed as providing varying benefits—whether in the form of private or public goods—raise contentious normative problems, in addition to being difficult to measure empirically. For these and perhaps other reasons, as Jan Leighley and Jonathan Nagler (2014, 123) state, “Discussions of benefits as integral to the decision to vote are few.”

When a value for  $B$  is required for an analysis using the voting calculus, studies in both decision and game theory may normalize the benefit of voting to provide a utility of 1, with losing providing 0 utility (Aldrich 1993, 247-248; Palfrey and Rosenthal 1985,

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<sup>3</sup> Contrast this with  $p$  and  $C$ , both of which are at least amenable to objective evaluation, although in practice of course there may be wide variation in how they are subjectively perceived. Valuation of the  $D$  term is presumably also highly subjective, but it has received greater attention since expressive benefits are said to provide the only rational motivation for voting given the presumed miniscule value of  $p$ .

63-65). This methodological assumption, while technically useful, obviously does little to exemplify the differing strengths of preferences for candidates as actually experienced by voters. A similar problem arises with empirical specifications like that of André Blais, who uses survey responses on the perceived importance of election outcomes to estimate a value for  $B$  within a fixed scale (Blais 2000, 73-77; see also Blais et al. 2000, 185-186). This modeling of  $B$  is useful in showing how relative differences in the perceptions of voting's benefits may affect the turnout decision, but it provides a very limited range for assessing perceptions of the substantive benefits of having one's preferred candidate prevail in a specific election.

Geoffrey Brennan and James Buchanan (1984) provide a more illustrative evaluation of  $B$  by allowing it to range as a monetary sum. In an equally divided electorate of 100 million voters, they show that given the miniscule value of  $p$ ,  $B$  would have to be valued at more than 12 thousand dollars for voting to be instrumentally rational, even with only minimal voting costs of 1 dollar. Moreover, as the election becomes even slightly less than perfectly competitive, the value of  $B$  required to balance out even 1 dollar in costs quickly becomes astronomical (Brennan and Buchanan 1984, 190). For an average congressional district, similar calculations show that even in a race deemed "too close to call," the value of  $B$  would need to be over 1 million dollars for the calculus to yield a positive result, which is said to provide conclusive evidence that participating is never instrumentally rational (Lomasky and Brennan 2000, 66-67).

However, it remains difficult to draw reliable conclusions about actual  $B$ -based decision-making based on these types calculations. Perhaps average voters might actually value having their preferred representative in office at 1 million dollars or even much

higher?<sup>4</sup> This question reflects the deeper normative difficulty involved in interpreting *B*, having to do with how people perceive the role of government and its value to them in a broader sense, in addition to judgments about the particular political system in place at the moment. From a perspective of normative democratic theory, the instrumental benefits of voting are often assumed to be quite low. Going back at least to Robert Michels (2001 [1911]), many political theorists have expressed skepticism regarding the benefits of voting under conditions of mass representative democracy. Even theorists of participatory democracy, like Carole Pateman (1970), who as indicated might be expected to lend support to the practice of participating in elections, have instead often seemed to belittle the value of voting. Communitarian theorists, who likewise might conceivably value electoral participation as a collectively shared public ritual, and even perhaps as a responsibility of democratic citizenship, have instead also seemed generally skeptical of the value of voting. Robert Bellah, for example, appears to advocate an attitude of instrumental indifference, stating that American political contests exhibit a “very tame polarity, because the opponents agree so deeply on most of the terms of the problem” (Bellah 1995, 51).

The recent civic engagement literature has likewise tended to deemphasize voting as a valuable form of democratic participation moving forward into the new political environment (see e.g. Boyte 2005; Zukin et al. 2006; Deneen 2008). Furthermore, some democratic theorists seem to harbor a normative bias against representative forms of democracy, which may be seen as distancing citizens from the possibility of genuine self-government and popular sovereignty. For example, Benjamin Barber appears to justify an

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<sup>4</sup> One might think to look at campaign contributions to provide some context on willingness to pay to elect a favored candidate, but contributions provide (or are at least perceived as providing) only a marginal increase in the probability of a candidate’s winning, so they might vastly understate the perceived value of *B*. A better proxy might perhaps be willingness to pay for the opportunity of casting a decisive vote.

attitude of alienation from electoral politics, arguing that voting is ineffective when citizens must rely on elected representatives in place of enjoying direct participation in government (Barber 1984, 171). Similarly, proponents of a deliberative conception of democracy, like James Fishkin (2009), also seem to devalue voting in their appeals for more thoughtful discussion of political issues than electoral representation generally provides (see Mackie 2011; Pennington 2010). Given an apparent deficiency of reasoned reflection and debate in electoral politics, these theorists view voting decisions as conveying at best vague and ambivalent preferences—or at worst highly irrational and potentially prejudiced dispositions.

In the empirical literature on the calculus, when the perceived benefits of voting are evaluated they have generally been found to have a significant effect on the turnout decision (Filer and Kenny 1980; Katosh and Traugott 1982; Blais 2000, 43, 143; Leighley and Nagler 2014, 134). Nevertheless, the value of  $B$  has often been assumed to be small and insignificant relative to the other terms of the calculus. For example, John Aldrich is frequently cited for the view that the instrumental benefits of voting are minimal (Aldrich 1993; 1997). Benjamin Highton likewise states that “there is little doubt that for nearly everyone, voting is a low-benefit activity” (Highton 2004, 507). Predictions of candidate convergence based on the median voter theorem (Hotelling 1929; Black 1948), in addition to broad complaints about the lack of political diversity in a two-party system—sometimes called “Tweedledee and Tweedeldum” politics—may also contribute to estimations of a relatively low value for  $B$  in the context of American elections. Aldrich thus states, “If there is little difference between the two candidates,” the  $B$ -term will be relatively small” (Aldrich 1997, 386), further writing that “it is not at all clear that people perceive much difference about who wins most elections” (Aldrich 1993, 263). Moreover, these observations about a low value of  $B$  are generally made with

regard to U.S. federal elections; in state or local elections, where the political stakes may be perceived to be much smaller, the value of  $B$  might be even lower (Percival et al. 2007; Blais 2000, 43).<sup>5</sup>

Additionally, the conventional empirical finding in the voting literature is that higher turnout levels in major U.S. elections would generally not yield significant differences in either electoral or policy outcomes (Wolfinger and Rosenstone 1980; Bennett and Resnick 1992; Gant and Lyons 1993; Nagel and McNulty 1996; Highton and Wolfinger 2001; Sides et al. 2008). This could perhaps be taken to imply that the prospective instrumental benefits of participating in these contests would be minimal for an individual deciding whether to vote or abstain. However, several other studies question the conventional wisdom that turnout doesn't really matter, instead finding evidence that higher levels of participation—particularly by lower socioeconomic demographics—would in fact alter political outcomes (Hill and Leighley 1992; Hill et al. 1995; Fellowes and Rowe 2004; Martinez and Gil 2005; Leighley and Nagler 2014). Relatedly, the question of whether elected officials are generally responsive to public preferences may also be relevant to assessing the benefits of voting. Many studies of this issue have documented at least moderate policy responsiveness to the political opinions and vote choices of American citizens (Monroe 1979; Monroe 1998; Stimson et al. 1995; Martin 2003; Canes-Wrone 2015). At the same time, however, such responsiveness is generally shown to be biased against the preferences of nonvoters and lower socio-

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<sup>5</sup> On the other hand, one might think that the perceived benefits of voting might be higher in subnational elections, since state and local governments could be seen as having more direct effects on a prospective voter's social and economic conditions (see Wood 2002, 228; Anzia 2014, 235 n. 3). Note that when state or local elections are held concurrently with federal elections, voting in down-ballot races is effectively costless, and participation may therefore be instrumentally rational even with low levels of expected benefits (see *infra* footnotes 30-31 and accompanying text).

economic demographic groups (Schumaker and Getter 1977; Griffin and Newman 2005; Gilens 2005; Bartels 2009; Gilens and Page 2014).

Another important issue in interpreting the value of  $B$  is whether to characterize the prospective benefits of voting as purely self-interested, or whether broader motivations to affect general social welfare should also be considered. By raising the possibility of social or altruistic benefits, several scholars have suggested a high value of  $B$  as a potential solution to the apparent paradox of voter turnout. Riker and Ordeshook in fact opened the way for such a  $B$ -term solution, suggesting, “It is likely that  $B$  is much higher for many people than anyone has heretofore supposed” (Riker and Ordeshook 1968, 39). Howard Margolis (1982) appears to have been the first to offer a detailed analysis of how introducing altruism or group-interest to the rational choice model could resolve the turnout paradox. In his model, individuals have separate utility functions for self-interest and group-interest, and they may therefore act rationally by devoting a share of their resources to altruistic goals (Margolis 1982, 38-39). Margolis concedes that in terms of self-interested utility the instrumental benefits of voting might not amount to more than a few thousand dollars, but he suggests that “the *social* value of a presidential election outcome is easily estimated in the billions.”<sup>6</sup> He thus explains that even given a  $p$  valued at just 1 in 100 million, a  $B$  of 1 billion dollars would make voting rational with costs under 10 dollars (88-89).

This approach raises some thorny issues concerning the meaning and motivations of rational behavior, echoing debates about the validity of transferring the common economic assumption of self-interest into the political arena (see Udehn 1996). Perhaps this explains why the  $B$ -term solution of Margolis seems for some time to have received

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<sup>6</sup> Margolis supports this conclusion with the fact that one billion dollars represents only a small fraction of the federal budget, over which the President has at least some discretion (Margolis 1982, 89).



scant attention in the voting literature. More recent work, however, has revived this approach. Like Margolis, Richard Jankowski proposes introducing a separate  $B$  to represent the expected utility from altruistic concerns with benefiting others, similarly demonstrating how it can be instrumentally rational to vote if one believes that one's preferred candidate will provide one billion dollars in collective or group benefits (Jankowski 2002, 64). Likewise, Aaron Edlin, Andrew Gelman, and Noah Kaplan utilize a social benefit model to show how voting in a relatively close election can be rational given the assumption that one's preferred candidate will provide a benefit of only ten dollars per citizen (Edlin et al. 2008, 297; but see Brennan 2011a, 19-20). Concluding that participating in large elections is rational only "to the extent that voters are *not selfish*," Edlin et al. also point out that the empirical literature on voting motivations is consistent with a social benefit explanation, given the strong evidence for "sociotropic" considerations in vote choices (Edlin et al. 2008, 304-305).<sup>7</sup> James Fowler adds experimental evidence for the proposition that altruistic concern for the well being of others is a primary motivation in turnout decisions (Fowler 2006).

Furthermore, from a normative perspective, David Estlund forcefully argues that voting should always be motivated by sociotropic concerns, indicating that "to the extent that voters...address only their own interests, the method of social choice is less than fully democratic" (Estlund 1990, 423). It may thus be quite reasonable to view the potential benefits of voting as exceedingly high. Simply put, individuals can have reasons to care deeply about electoral outcomes, and they may accordingly place a very high value on  $B$  in the calculus. As indicated, this perspective tends to highlight the profound

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<sup>7</sup> Paul Meehl introduced the term "sociotropic" to designate the attitude of "taking some account...of other persons' interests or...the collective's interest (Meehl 1977, 14)." Although evidence of sociotropic considerations in vote choices does not necessarily prove a lack of selfish motivations (Kinder and Kiewiet 1981, 132), it is today accepted even by the most economically-oriented theorists that voters are typically motivated to a significant degree, if not entirely, by collective concerns (see e.g. Caplan 2007, 19).

ethical issues that are involved in democratic elections, which legitimize the coercive power of the state and its legal monopoly on violence. An election may in fact be seen as “a form of ritualized, non-violent combat” (Adams 2009, 120), with the act of voting itself characterized as part of a coercive process in which democratic citizens engage in what is essentially “an exercise of *power* over one another” (Beerbohm 2012, 51). This approach lends support to a normative theory of democracy wherein citizens may incur moral liability for the outcomes that result from their decisions in the electoral arena. Political theorists may thus emphasize the potential for citizens to impose enormous costs and benefits on others through their electoral decisions (see e.g. Caplan 2007), thereby placing great responsibility on voters to make “good” choices (Brennan 2011a), however these may be defined.

As should be clear from this discussion, the perceived benefits of voting are subject to wide variation among a citizenry with diverse ideas about democratic norms, and faced with varying types of electoral choices. It might thus seem difficult to generalize at all about the perceived benefits of voting. However, in place of simply assuming that  $B$  is generally very high or very low, as much of the previous work in this area seems to do, the value of  $B$  may instead be allowed its natural variation in hopes of deriving a theory that can account for these discrepancies. Focusing in more closely on the Downsian differential and its effects on the individual turnout decision in a specific election will help suggest a useful typology of potential reasons for  $B$ -based decisions to participate or abstain from voting.

### **3) *B*-BASED TURNOUT DECISIONS: INDIFFERENCE, ALIENATION, AND AMBIVALENCE**

The social benefit resolutions of the turnout paradox, as described above, rationalize participation by relying on the possibility of a high enough  $B$  to outweigh even an infinitesimally small  $p$ . However, if  $p$  were actually a much larger fraction, perhaps even approaching or equaling one in a highly competitive election, an extremely high value for  $B$  would not be needed to make a decision to participate seem rational.<sup>8</sup> Nonetheless, even assuming that  $p$  were equal to one, it would obviously still not be instrumentally rational to participate in a given election where  $B$  is perceived to be zero. There are at least three potential attitudes that could give reason for the perceived benefits voting to be perceived as so negligible that turning out to vote seems useless even in a very close election: a) indifference, b) alienation, and c) ambivalence.

#### **a) Indifference**

As indicated,  $B$  will be very small where electoral choices are perceived to be so similar to each other that any expected utility difference between them seems negligible or nonexistent. Thus, Downs' application of the median voter theorem in a spatial model is generally depicted as implying a convergence of ideological platforms that would be expected to yield a very minimal or zero value for  $B$  (see Grofman 2004, 25). Similarly, game-theoretic equilibrium analysis predicts strategic convergence of candidates to an identical position, resulting in universal abstention (e.g. Ledyard 1984, 18). Melvin Hinich and Peter Ordeshook were perhaps the first to formally define a decision to

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<sup>8</sup> As argued in Chapter 1,  $p$  may be interpreted as equal to 1 whenever a predicted electoral outcome is too close to call, and it should generally have a non-negligible value as long as an election is somewhat competitive. See also Riker and Ordeshook (1968, 39), suggesting that individuals may greatly overestimate the value of  $p$ . Blais empirically confirms the propensity to overestimate  $p$ , particularly in close elections, and he suggests that individuals may not actually multiply  $p$  and  $B$ , but may instead consider them separately and simply add them together (Blais 2000, 138).

abstain based on an insignificant utility differential between candidates or parties as abstention due to *indifference* (Hinich and Ordeshook 1971, 75; see also Brody and Page 1973, 2). In the simplest spatial model, indifference would be represented as in Figure 2.1, with the prospective voter's ideal position represented by X, and the positions of the candidates in a two-person race represented by A and B:



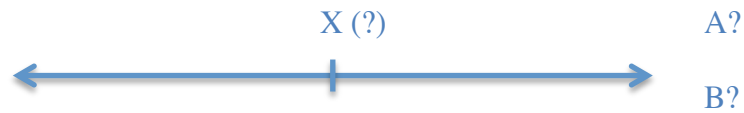
**Figure 2.1: Indifference due to Candidate Convergence**

In practice, however, predictions of convergence have not generally borne out (Grofman 2004). This is particularly evident in the strongly polarized environment of contemporary U.S. politics (see Hetherington 2001; Pildes 2011). More commonly perhaps, indifference-based abstention may arise from lack of information about the choices on the ballot, which prevents a prospective voter from evaluating the utility differential between candidates. Thus, John Matsusaka demonstrates how having less information about electoral choices, and therefore being less certain about how to evaluate the candidates or parties, leads to a lower evaluation of *B* and a decreased likelihood of voting (Matsusaka 1995).<sup>9</sup> Indifference resulting from insufficient information is indeed normatively and empirically important, but it does not entail any direct engagement with perceived benefits through evaluation of a utility differential. Instead, the value of *B* may be seen as equal to zero simply because the prospective voter,

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<sup>9</sup> Matsusaka notes that in practice *more* information could actually make one less certain of one's prior beliefs, also leading to a lower value of *B* (Matsusaka 1995, 112; see also Tollison and Willett 1973). Information costs and their implications are discussed extensively in Chapter 3's analysis of the *C* term of the calculus.

lacking any relevant information with the regard to the electoral decision, has no basis for assessing the options (or the individual's own position in relation to them), and no instrumental reason for voting, as depicted in Figure 2.2.



**Figure 2.2: Indifference due to Lack of Information**

### **b) Alienation**

A perhaps more complex source of *B*-based turnout decisions arises with *alienation*, which may be simply understood as having a negative attitude toward all options presented on the ballot. Hinich and Ordeshook thus define alienation in terms of perceptions of negative utility, stating: “A citizen’s probability of voting is inversely related to the loss he [or she] associates with his [or her] most preferred candidate” (Hinich and Ordeshook 1971, 75). However, as Richard Brody and Benjamin Page explain, abstaining due to this type of alienation is not necessarily instrumentally rational, since there would still be a positive utility difference between candidates even if the associated utilities are both negative (Brody and Page 1973, 3). Unless candidate positions are perceived as convergent, one candidate will always be closer to the voter’s ideal point, and there could thus be a strictly instrumental motivation for participating even under conditions of alienation. Brody and Page thus write, “Given a difference between two disliked candidates, abstention could lead to the victory of the greater over the lesser evil; knowing this, the rational citizen should vote” (Brody and Page 1973, 3). In fact, alienation-based abstention associated with a decision to withhold a vote for a “lesser evil” appears to be more of an expressive rather than an instrumental motivation, and it is consequently better modeled in *D* rather than in *B* (see Brennan and Hamlin

1998, 155). In reality, a prospective voter may sometimes have to choose between instrumental and expressive motivations, which could pose a particularly hard choice, as explored further below.

More persuasively perhaps, alienation-based abstention for instrumental reasons can be depicted as the situation where a prospective voter perceives both candidates in a two-person race to be so distant from the ideal position that it yields what is in effect an attitude of indifference.<sup>10</sup> As depicted in Figure 2.3, alienation is thus instrumentally relevant only when it results in *functional* indifference between the candidates:



**Figure 2.3: Functional Indifference due to Alienation**

The negative effects of alienation on the turnout decision, beyond being consistent with common sense expectations, have been empirically demonstrated as well (Zipp 1985, Plane and Gershtenson 2004, Leighley and Nagler 2014; Adams et al. 2006).<sup>11</sup> From a normative perspective, alienation is extremely important, representing perhaps the most common *B*-based motivation for non-voting. E. E. Schattschneider’s seminal work, *The Semisovereign People*, examines abstention from this exact perspective, explaining how the primary locus of conflict in modern democratic politics takes place around “the

<sup>10</sup> This seems generally consistent with an assumption of decreasing intensity of preferences, such that expected utility decreases more quickly moving further away from an individual’s ideal point (see e.g. Valasek 2012, 347).

<sup>11</sup> These studies distinguish between turnout effects associated with indifference—measured as the perceived distance between the two candidates, and effects associated with alienation—measured as the distance between the individual’s ideal position and the position of the closer candidate. They do not appear to distinguish expressively-based alienation from alienation that is instrumentally relevant because it leads to functional indifference, as suggested by the analysis here. These two types of alienation may in fact be difficult or impossible to distinguish in practice, but in theory they should be seen as separate potential motivations for abstention. Some implications of expressive alienation, modeled as negative utility in the *D* term, are discussed below. See Callander and Wilson for a formal model of specifically expressive alienation, demonstrating how it decreases turnout, increases polarization, and also “has a dramatic impact on the behavior of strategic candidates and policy outcomes” (Callander and Wilson 2007, 1047-1048).

kinds of things that make the vote valuable” (Schattschneider 1960, 102). Accordingly, in place of indifference resulting from an apparent convergence of parties or candidates, it more commonly results from efforts to induce alienation among certain individuals and groups, as candidates and parties aim to dissuade these potential voters from participating by attempting “to make the vote meaningless” for these citizens (103). Schattschneider thus concludes, “Abstention reflects the suppression of the options and alternatives that reflect the needs of the nonparticipants” (105), which he refers to as the *displacement* of political conflict.

Schattschneider’s displacement theory holds that the perceived benefits of voting are structured by the organization of partisan alignments along certain ideological cleavages, which regulate the nature and scope of political conflict and thus determine the value of participating in an election. An instrumentally rational decision to vote implies a finding of significant difference in utility between the ballot options, with lines of political cleavage raising issues that resonate with the individual’s desires and preferences. Conversely, a decision to abstain is explained by the boundaries of political conflict being drawn far enough away from the individual’s core concerns that the outcome is perceived as irrelevant. Abstention, according to Schattschneider, is thus not best understood through observations of the qualities and characteristics of the nonvoting public on the “demand side,” but is rather better explained by the “supply side” manipulation of the benefits of voting by those with power to set the terms of political debate. This represents a unique perspective on abstention that has important consequences for normative democratic theory. In place of focusing on demographic characteristics that distinguish voters from non-voters (e.g. Wolfinger and Rosenstone 1980), or focusing on how electoral rules and regulations may increase voting costs in a way that discourages broader participation (e.g. Piven and Cloward 1988), abstention

under this approach is seen as a logical response to limitations being imposed on the context and scope of political conflict.<sup>12</sup> Rather than reflecting some motivational or informational deficiency on the part of non-voters, abstention can instead be seen as “the outcome of a reasoned, thoughtful political position” that results from the lack of a perceived benefit to participating (Zipp 1985, 59; see also Plane and Gershtenson 2004, 88).

However, the main point of emphasis from the perspective of the calculus is that this type of *B*-based abstention is only instrumentally rational when alienation leads to functional indifference regarding the electoral outcome. As indicated, if two candidates are positioned far away from the individual’s ideal point, with both predicted to provide negative utility, there is still an instrumental benefit to voting for the perceived lesser evil if that candidate is seen as providing somewhat less negative utility than the other. In fact, voting against a lesser evil should not necessarily be viewed as theoretically problematic, as situations of being forced to choose between evils are arguably quite common, and at least from an instrumentally rational perspective there would seem to be nothing wrong with having to make such a choice. As implied by Brody and Page, a decision to abstain under such circumstances could actually be seen as decidedly *irrational* from the perspective that it might “lead to the victory” of the greater evil. In the absence of functional indifference, voting for of a lesser evil could in fact conceivably take the form of a *moral obligation*. If one accepts the sociotropic interpretation of *B* in the voting calculus, and one believes that an election could be close enough for the value of *p* to be near or equal to one (meaning one’s vote is virtually certain to affect the

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<sup>12</sup> This is not meant to imply that demographic variables aren’t good predictors of turnout, which they of course continue to be (Smets and van Ham 2013), or that demographic biases in turnout are not normatively important, which they will be as long as socioeconomic inequality continues to influence turnout and political responsiveness (APSA 2004; Gilens 2005; Solt 2010). Furthermore, the effects of institutionally determined voting costs are also important, as discussed in Chapter 3.



outcome), then it seems a short step to derive a moral obligation to do what is within one's power to prevent the greater evil from taking hold.<sup>13</sup>

This perspective on the ethics of electoral participation is well suited to Eric Beerbohm's conception of democracy as a "system of shared liability" (Beerbohm 2012, 29). According to Beerbohm, "No matter how vanishingly small our individual contribution...we still are answerable to individuals who face the terms that we play some role in setting." This approach to democratic ethics underlies an instrumental motivation for voting even under conditions of alienation, as Beerbohm asserts, "We can share in the job of governance while finding the ensuing laws to be odious and even alienating to our basic convictions" (29). Maintaining a sociotropic perspective on the benefits of voting, Beerbohm thus outlines the basis for a moral obligation to cast one's vote in opposition to a perceived greater evil: "To be a citizen is to be put into a moral relation with millions of other individuals.... Failing to play a contributory role in defeating political injustice, under certain conditions,<sup>14</sup> makes [citizens] accomplices to the state's wrongdoing" (63). Clearly, this is an ethics of voting that places great responsibility on democratic citizens.

It is worthwhile to contrast this instrumentally derived duty to vote that emerges from the interpretation and assessment of *B* with another perspective on democratic ethics

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<sup>13</sup> This of course assumes that the costs of voting are not prohibitively high, and it also assumes the absence of any competing moral duty to abstain for expressive reasons, as discussed below.

<sup>14</sup> Beerbohm qualifies his argument for moral complicity in democratic outcomes by indicating that individuals who have no opportunity to achieve meaningful representation due to circumstances of socioeconomic and political inequality may have no ethical duty to participate, asserting: "If some of the poorest citizens have no observable power over their representatives...we cannot insist that they have a strong reason to vote" (Beerbohm 2012, 77). This qualification, however, does not preclude the possibility of an instrumentally derived duty to vote against a perceived greater evil even among highly marginalized and alienated citizens. In fact, Beerbohm describes his theory of shared liability as resting in part on expressive, rather than instrumental, motivations: "The very idea of complicity...relies on a conception of action as having partly expressive or symbolic value that is morally distinct from its production value" (75). He furthermore admits there "may be other arguments" for marginalized citizens to participate (77).

that derives a moral duty to *abstain* based on valuation of the benefits of voting. Jason Brennan argues that “citizens have an obligation not to vote badly. They should abstain rather than pollute democracy with bad votes” (Brennan 2011a, 68). More specifically, Brennan holds that individuals have a duty to refrain from what he terms “unexcused harmful voting,” which “occurs when people vote, without sufficient reason, for harmful policies or candidates likely to produce harmful policies” (69). Like Beerbohm, Brennan maintains a sociotropic perspective on voting’s benefits, yet he reaches the exact opposite conclusion on the likely direction of any moral obligation, stating, “Voters should justifiably believe that the policies or candidates they support would promote the common good. Otherwise they should abstain from voting” (91). In effect, Brennan argues that individuals who are not well informed about politics and policy lack the requisite “epistemic and moral credentials” (101) for electoral participation, and they are therefore likely to create social disutility through their votes, given that their decisions are largely motivated by ignorance and bias (see also Caplan 2007).

This is of course a very different approach to interpreting the benefits of voting. Beerbohm’s potential duty to participate is based on a subjective individual assessment of the value of  $B$ , consistent with the framework of the calculus, while Brennan’s approach seems to hold voters to a more objective standard of utility assessment. Yet the two perspectives are not necessarily wholly inconsistent. Like Beerbohm, Brennan’s approach to electoral ethics also places a great deal of individual responsibility on democratic citizens, though it arguably demands too much—and may even be conceptually incoherent—in requiring voters to abstain when they somehow know that their vote is likely to yield more social benefit than harm.<sup>15</sup> Moreover, while it is presumably true that

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<sup>15</sup> Brennan admits that it could seem trivial (or “self-effacing”) to require that individuals cast their votes in a manner justified in promoting the common good, since people generally seem implicitly to believe that their choices are in fact justified in this manner. However, he argues that individuals will sometimes

abstention would be rational for individuals who believed their votes were likely to result in social harm, in formal terms of the calculus this would imply a preference for voting in favor of a candidate expected to provide less utility, which of course does not seem very reasonable (barring a strategic motivation). In effect, Brennan appears to argue that prospective voters who know they lack the requisite qualifications to vote in favor of the common good should always value  $B$  at zero, adopting a stance of functional indifference due to their inability to make the right decision. This is a complex normative claim that may or may not be defensible, but from the subjective perspective of individuals who do in fact perceive a utility differential, and thus are not functionally indifferent, and who additionally believe they *are* qualified to make a justified decision, even Brennan might be forced to admit the possibility of a moral obligation to participate.<sup>16</sup> What is clear is that Brennan believes the potential value of voting to be extremely high, given his position that “harmful voting” may result in great collective disutility. The potential duty to vote discussed here thus rests on foundations similar to those Brennan employs in

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intentionally do things they know are wrong, and that the effects of such “vices” may be minimized through a process of self-realization (Brennan 2011a, 90-91). For an argument against the notion that individuals knowingly make wrong voting decisions (engaging in “willful perversity”), see Bennett and Friedman (2008, 206-212); Friedman (2013a). Also see the response to Brennan’s abstention argument by González-Ricoy (2012).

<sup>16</sup> It is of course possible to dispute Brennan’s normative claim, as discussed in detail in Chapter 3. In fact, Brennan would likely argue against a duty to vote even under these circumstances, if only because he believes the value of  $p$  is always negligible. He devotes nearly an entire chapter of his book, *The Ethics of Voting*, to arguing that individual votes in a large election can never have instrumental value or causal efficacy (Brennan 2011a, 17-34). Yet he subsequently spends several pages arguing for an ethical duty to refrain from “harmful voting” notwithstanding the fact that “a bad vote has vanishingly small disutility” (71-76). Whether his position on the negligibility of individual votes is consistent with the assertion of an instrumentally based duty to abstain is perhaps an open question, as Brennan himself seems to admit (12). It is, however, interesting to note his admission that in some cases an individual could be justified in voting for a lesser evil, as he illustrates: “We can imagine scenarios under which voting for the equivalent of Mussolini is the *best alternative* as compared to abstaining from voting or voting for the equivalent of Hitler” (76, emphasis added). The question to him is whether voting for the lesser evil should be described not just as the best alternative, but as a moral obligation under such circumstances.

arguing for a duty to abstain, namely, the expected instrumental utility associated with electoral participation.

### c) Ambivalence

Besides alienation and indifference, another motive for *B*-based turnout decisions is *ambivalence*, which can be defined as “endorsement of competing considerations relevant to evaluating an attitude object” (Lavine 2001, 915). Much of the growing political science research dealing with this psychological condition builds on the work of John Zaller and Stanley Feldman, who suggest that in place of having what one might call “true attitudes,” individuals are often internally conflicted regarding particular issues or choices, causing them to exhibit apparently contradictory opinions in their responses to political survey questions (Zaller and Feldman 1992, 609-610). In the basic spatial model of vote-choice, this type of ambivalence could be characterized by the individual’s preferred position falling at a point equidistant—but relatively close<sup>17</sup>—to the two candidates, as in Figure 2.4, which illustrates the basic situation where the prospective voter’s preferences might pull equally in opposite directions.



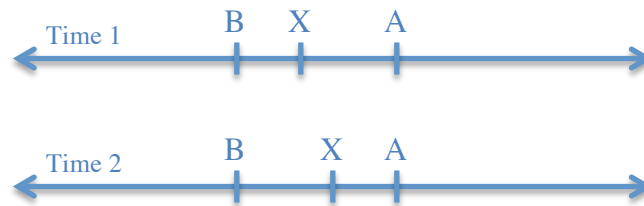
**Figure 2.4: Basic Ambivalence**

One could also conceive of ambivalence arising out of a more dynamic situation that incorporates the possibility of changes in the individual’s preferred position and/or the perceived positioning of the candidates. This might occur, for example, as a result of information being acquired and deliberation taking place as an election campaign

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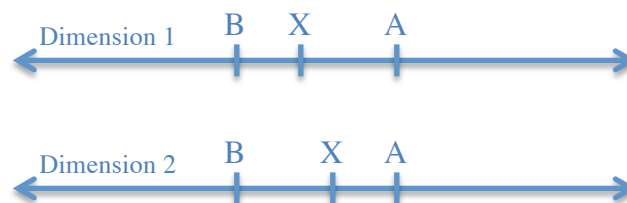
<sup>17</sup> Note that if the individual’s ideal point falls between two candidates whose positions are perceived as both quite distant, it could result in (expressive) alienation, as well as functional (instrumental) indifference if the candidates’ positions seem effectively equidistant.

progresses over time. A prospective voter might thus go back and forth between preferring different candidates over time, possibly resulting in an overall attitude of ambivalence, as depicted in Figure 2.5.



**Figure 2.5: Ambivalence over Time**

Ambivalence could further arise when moving from a simple one-dimensional model to a more complex but somewhat more realistic model where prospective voters can have potentially conflicting preferences over several different ideological or value-based dimensions (see Carmines and D’Amico 2014, 8). For example, one candidate might be preferred on grounds of character or leadership qualities, while another candidate could be preferred on specific public policy issues (Buttice and Stone 2012). A prospective voter who might in fact hold “true attitudes” on two or more different dimensions could thus be pulled in opposite directions by these cross-cutting preferences, again resulting in a state of ambivalence, as shown in Figure 2.6.



**Figure 2.6: Ambivalence over Different Dimensions**

One might initially assume that ambivalence of any type should lead to abstention, since the ambivalent individual appears to have no rational basis for deciding how to vote. In terms of the turnout calculus, ambivalence could be said to create an obstacle in specifying the  $B$  term, which might lead an individual to value it at zero, resulting in a decision to abstain (assuming that  $D < C$ ). This would imply that ambivalence, like alienation, causes what is in effect just another form of indifference. However, as with alienation, there may be reasons to think that a decision to abstain under conditions of ambivalence may not be the normatively best choice, or even necessarily the most rational one. Ambivalence is fundamentally different from indifference in that ambivalent individuals do have preferences that carry affective valence, even if their preferences fail to result in fixed and well-formed attitudes. Ambivalent individuals also presumably have acquired substantial information about the electoral choices. However, their preferences seem to conflict, and these individuals may thus understandably have a very difficult time reconciling them in order to reach a final decision. As indicated, ambivalent individuals do attach value and meaning to the election outcome, and the positions of the candidates are presumably close enough to their own positions to avoid an attitude of alienation. Such individuals should indeed be expected to have trouble deciding how to vote, given the complexity of the electoral choice from their perspective, but they should not necessarily be expected to abstain from voting.

In fact, empirical evidence does not support abstention arising as a direct result of ambivalence. Diana Mutz examines the effects of exposure to “cross-cutting networks” of opposing political ideas, which she theorizes could lead to an attitude of ambivalence by activating a psychological process of “*intrapersonal conflict*” (Mutz 2002, 840). Mutz finds that such exposure does actually reduce political participation, including the

propensity to vote, but she indicates that these effects result not from internalized ambivalence, but rather from an externally oriented desire to avoid the risk of social conflict that comes with political disagreement.<sup>18</sup> Even more to the point, Sung-jin Yoo disaggregates the turnout effects of ambivalence and indifference, finding that ambivalent individuals—those who display conflicting attitudes rather than lacking attitudes altogether—are in fact no less likely to vote than committed partisans (Yoo 2010). Discussing the Downsian differential, Yoo points out that the instrumental benefit of voting could be calculated at zero for at least two possible reasons: 1) because an individual has zero expectation of utility from either candidate—perhaps due to lack of information that results in indifference, or 2) because the non-zero expected utilities for each candidate happen to balance out evenly, which leads to ambivalence. Ambivalent individuals should therefore not be compared to those who are indifferent, for as Yoo states, “It is plainly wrong to treat those with equal feelings about parties and candidates the same as those without any feelings” (173). Yoo even concludes, “The high turnout of ambivalent citizens makes this group critical for deciding the electoral outcome (174).”

Ambivalent individuals can in fact be seen to epitomize the politically critical group of “persuadable” voters, who in a competitive election come to be the “swing” vote. These voters may actually make up a substantial percentage of the expected electorate, as high as 25 percent at the earlier stages of a U.S. presidential campaign (Jacobson 2014, 41-42). Targeting ambivalent voters can therefore be crucial to

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<sup>18</sup> Mutz initially hypothesizes that if cross-cutting exposure reduces participation as a direct result of social pressure, and not internal ambivalence, then negative effects should only be observed with forms of political participation that are publicly observable, to the exclusion of voting which takes place in private (at least with respect to vote choice). When she finds, to the contrary, that cross-cutting exposure also significantly reduces the propensity to vote, she suggests that the act of voting may also involve “social accountability” (Mutz 2002, 849; see also Pattie and Johnston 2009, 283). Note that the fact that Mutz’s exposure effects are attributed to social pressure and not ambivalence implies that these effects are modeled not in terms of instrumental utility in *B*, but rather as non-instrumental (dis-)utility in *D*.

campaign strategists, as the vote choices of these individuals are effectively pivotal to the outcome in an electorate that appears otherwise evenly divided. Swing voters have actually been found to have increased influence on policy outcomes (Griffin and Newman 2013), so notwithstanding a differential value that would formally appear equal to zero, ambivalent individuals might conceivably value  $B$  even higher than partisan voters with well-defined preferences. Moreover, from a normative perspective, there may be good reasons for valuing ambivalence and encouraging this attitude in the approach to vote choices. Mutz alludes to the idea that ambivalence is associated with an approach that reflects more “balanced judgment” and the recognition of complexity in political issues (Mutz 2002, 840). More broadly, Howard Lavine, Christopher Johnston, and Marco Steenbergen advocate for moderating the tendency toward unreasoned partisanship with a more principled attitude of ambivalence, which they state “provides fertile ground for learning and open-mindedness and...a willingness to assume the cognitive burden of deliberative political thought” (Lavine et al. 2012, xiv). Ambivalence could thus be particularly valuable to deliberative theorists, who are inclined to view decisions based purely on partisan attachments as lacking in full democratic legitimacy (e.g. Fishkin 2009; Landemore 2013a).

A recent paper by Scott McClurg and Phillip Garee nicely ties together empirical and normative insights into ambivalence. McClurg and Garee discuss how ambivalence implies a degree of cognitive complexity in being able to accommodate intensely held but conflicting attitudes, and they find that intense ambivalence predicts turnout separately from, and at least as strongly as polarized partisanship (McClurg and Garee 2015, 12). As opposed to the chronically indifferent who have no interest at all in election outcomes, the ambivalent are more likely to have invested in acquiring information and to have deliberated about the decision, leading them to perceive both positive and negative



attributes of the choices. Despite their apparent difficulty in reaching a decision, these ambivalent participants nevertheless perceive the decision as extremely important. While their expected utilities from the candidates may appear to balance out more or less evenly, they should not be assumed to value  $B$  at zero, and they will not necessarily be “frozen by indecision” and abstain (13). McClurg and Garee in fact suggest that “ambivalence is its own form of political engagement,” concluding that the difficulty these voters experience in reaching a decision shows how they are the ones who “must do the heavy lifting in democratic politics” (14).

However, this begs the question of *how* ambivalent individuals decide how to vote, which McClurg and Garee do not directly address, and it takes for granted the deeper normative question of what it even *means* to make a decision under conditions of ambivalence. Do ambivalent voters simply choose randomly? In that case they might be seen at best as unnecessary to democratic outcomes, or at worst as “polluting the polls” (Brennan 2009a) by voting in an insufficiently reasoned manner and likely relying on irrational biases (e.g. Caplan 2007). On the other hand, there may be good reasons for valuing the participation of more independently-minded swing voters who shun reflexive partisanship and who acquire and use political information in ways presumed to lead to more deliberatively informed democratic outcomes. How then should we understand what goes on in the minds of ambivalent voters when they make their choice? This is a complex and important question that cannot be completely addressed here in the detail it deserves, but some suggestive directions for a response are suggested by Ruth Chang’s work discussing the philosophical implications of *hard choices*. Chang provides a normative framework for understanding what it means to make difficult but important decisions under conditions of intense uncertainty, and her approach thus helps clarify the

broader meaning and implications of ambivalence as it relates to the instrumental benefits of voting.

Chang's earlier work adds conceptual clarity to the fundamental difference between ambivalence and indifference, as she distinguishes between the types of hard choices that are "at the root of moral dilemmas" and more generic situations where the available alternatives seem to offer more or less equal utility (Chang 2002, 659). She illustrates as follows: In comparing any two alternatives—X and Y—one might think there are only three possible relations: X is better than Y, Y is better than X, or X and Y are equally good (or bad). However, Chang argues that there is in fact a fourth possible relation between the alternatives; namely, X and Y may be "*on a par*," and she contends that hard choices presenting moral dilemmas may be instances of "*parity*, not ignorance, incomparability, or indeterminacy in comparison" (661-662, emphases added). According to Chang, "[T]he possibility of parity shows the basic assumption of standard decision and rational choice theory to be mistaken: preferring X to Y, preferring Y to X, and being indifferent between them do not span the conceptual space of choice attitudes one can have toward alternatives" (666). Without explicitly mentioning ambivalence, Chang's conception of parity among alternatives, and the "perplexity" it engenders (682), closely mirrors the attitude of ambivalent voters who may perceive that the value of *B* is substantial, but their conflicting preferences create difficulty in making a decision. Accordingly, she indicates that situations of parity often result in "superhard" ethical problems with significant real-world consequences, which are not the types of choices that could reasonably be decided by some "arbitrary stipulation" like flipping a coin (685). Nevertheless, decision-making in these cases is still "within the reach of practical reason," according to Chang, although "it remains to be seen how justified choice is

possible between items that are on a par” (666). This is a matter she takes up in subsequent work.

As an example of the type of hard choice that could present a situation of parity, Chang considers someone struggling with a major life-altering choice between two alternate career paths. The essence of the problem inheres in the fact that abstention is not an option, and yet it still seems impossible to reason one’s way to a definitive decision: “Sometimes the reasons in a choice situation fail to determine what one should do.... Still, one must make a choice” (Chang 2009b, 248). In this situation one’s reasons for making a decision appear to have *run out*, as Chang explains: “Reasons run out when they fail to deliver a univocal answer to the question, ‘What should I do?’” (249). Again, she indicates that picking randomly doesn’t seem right for a decision as important as a career choice, and neither she says does “plumping” a decision, which would involve choosing not randomly but for no specific reason at all (250). When one’s reasons have run out, continuation of rational deliberation—as conventionally understood—is unlikely to help in reaching a decision, but Chang indicates that “further ‘deliberation’ of a different kind can lead to a rationally determined choice” (253). She explains that deliberating over a hard decision is actually a two-stage process: At the first stage, deliberation involves evaluating the “given” normative reasons for or against a choice, which is the conventionally understood process of rational decision-making. However, when given reasons have run out because they appear to be a par, a second stage of rational deliberation emerges, one that involves creating “voluntarist” reasons for choosing through “an act of will” (256-257). Chang’s novel claim is that “willing a consideration to be a reason is part of the process of making oneself into a distinctive normative agent, that is, creating one’s own ‘rational identity’” (259).

This is a somewhat mysterious and potentially profound assertion that cannot be fully explored here, but the essential idea is as follows: For Chang, creating one's rational identity implies deliberation over one's "normatively ideal self—a loosely unified way of understanding the reasons that justify doing what [one has] most reason to do" (261). She admits that it might initially seem paradoxical to allow rational actors to voluntaristically create their own reasons for choosing one alternative over another, for "if being rational is responding appropriately to our reasons, it is not clear how *we* can get enough distance from our reasons to be able to make ourselves into one kind of distinctive rational agent rather than another" (260). To resolve this problem, the ethical decision theory she proposes is one of "hierarchical voluntarism," in which given reasons are always evaluated first, and only when these reasons have run out do voluntarist reasons come into play. If given reasons are insufficient for choosing either alternative—because they seem to be on a par—then "you can create for yourself a voluntarist reason that may then give you all things considered most reason to choose one alternative over the other" (265). Chang refers to this as allowing for a "*space of rational freedom*," which denotes how individuals can (rationally) create their own voluntarist reasons for choices that seem to fall beyond the normative reach of given reasons.<sup>19</sup>

Chang further asserts that this ethical approach may also apply to resolving difficult problems in social choice, suggesting that "many—and the most interesting—social conflicts of the simple form have parity as their structure" (Chang 2009a, 154).<sup>20</sup>

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<sup>19</sup> Chang's novel approach requires—and deserves—a close reading for full appreciation of its insight into the nature and meaning of rational decision-making. She writes, "We are authors not only of our actual lives but also of our ideal rational lives—of the best that we can be, rationally speaking. The governing of our ideal rational selves is arguably the central—and most exalted—exercise of rational agency" (Chang 2009b, 262); and furthermore, "This crafting of our distinctive rational identities is, in a way, what life is all about" (267).

<sup>20</sup> The "simple form of practical conflict," according to Chang, involves a choice between two alternatives where "all things considered, neither [alternative] is better than the other" (Chang 2009a, 140).

Hence, societies might also be able to collectively create their rational identities through a voluntaristic reasoning process that seeks to answer the question: “What kind of society should we be?” (156). Chang indicates that elections will generally be ineffective for responding to this question, though she does not specify exactly how else such a process could take place.<sup>21</sup> The implications of applying her normative framework at the societal level are indeed provocative,<sup>22</sup> but returning to the individual-level decision of the calculus, Chang’s normative framework provides a crucial insight into how ambivalent voters should decide—and what it means for them to decide—when they perceive the alternatives to present a situation of parity. The decision of how to cast one’s vote is perhaps not as much a major life-altering decision as a career choice, but it could certainly be perceived as extremely important and not appropriate for randomly picking or plumping—nor for abstaining, particularly assuming an altruistic interpretation of *B* in a highly salient, competitive election. When reasons for choosing one alternative over another appear to have run out, Chang’s theory counsels ambivalent voters to deliberate over a voluntaristic vote choice in the knowledge that they thereby act in a way that contributes to forming their rational identities with regard to politics.<sup>23</sup>

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<sup>21</sup> According to Chang, “[M]ajority voting, which permits self-defeating cycles, is an inappropriate means to self-governance” (Chang 2009a, 156-157). As with individual-level choice, she suggests that creating a rational identity at the societal level involves deliberation, and she thus broadly associates this process with theories of deliberative democracy (157).

<sup>22</sup> Chang explains how hierarchical voluntarism could apply at the societal level as well, suggesting that “in so far as we want to achieve certain values, we should deal with political conflict in a way that is reasonable in light of those values, and in so far as we want to do what’s rational given the [parity] structure of the conflict itself, then we should...self-govern.” Political decision-making would accordingly involve “two distinct and autonomous normative domains” (158). Interestingly, this perhaps resembles a distinction between constitutional level decision-making, where choices are based on (at least purportedly) given reasons, and the societal space of rational freedom in regular democratic politics, where voluntaristic social choice may take place.

<sup>23</sup> Chang’s theory also provides a cogent response to Jeffrey Friedman’s expansive attack on voluntaristic ethics in liberal theory, and particularly his argument that voluntarism in essence implies an ethically incoherent “right to do wrong” (Friedman 2013a, 39). Friedman describes a conventional logic of choice which presumes that “normative distinctions can be made among actions, such that one choice emerges as ‘better’ than the others” (46). Regarding choice in a situation of apparent “equipoise,” he writes,

This extended discussion of the question of vote choice under conditions of ambivalence has led away from the original discussion of the decision to vote or abstain.<sup>24</sup> Returning to the turnout calculus, the key point here is that ambivalence may also arise with respect to the decision of whether to vote or abstain in a situation where instrumental and expressive motivations are in conflict. Chang’s ethical approach might thus help resolve this critical—and presumably fairly common—dilemma, which is associated with an ambivalence that might arise under conditions of alienation. As discussed previously, an individual who perceives even a very small instrumental difference between two “bad” candidates (providing a net positive value for *B*) might strictly speaking still have sufficient motivation to cast a ballot in favor of the “lesser

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“Inaction...is the only other alternative—apart from mechanical determination—to normative determination.... An agent stuck in this familiar position would be like the legendary Buridan’s Ass, which starved because it was unable to choose among what seemed to it identical bales of hay” (68). Friedman thus denies not only the possibility of a rationally determined choice under conditions of parity, but even the possibility of free will under such conditions, stating that free choice “cannot take place in the absence of a *perceived* advantage for one option over the others.... If one *could* choose without ranked antecedent perceptions of the good, one’s ‘choices’ would (by the principle of sufficient reason) have to be determined by mechanical causes, not free will” (68-69). Chang’s approach to voluntaristic choice is clearly in strong tension with Friedman’s logic, and she specifically excludes the possibility of a “right to do wrong” through her hierarchical normative approach that allows for voluntaristic choice only after given reasons have run out (see Chang 2009b, 269).

<sup>24</sup> Before leaving vote choice completely, one more insight that emerges from Chang’s approach relates to the normative understanding of the choices of committed partisans. These individuals obviously have no trouble perceiving a differential value of *B* and making their choice, but as indicated previously, their decisions are often assumed to be normatively deficient for lacking foundations in a sufficiently deliberative reasoning process (e.g. Landemore 2013a). However, Chang’s hierarchical framework also helps explain how personal *commitments* can be seen as voluntaristically rational “exercises of our *normative powers*, the power to confer reason-giving force on something through an act of will” (Chang 2013, 75). Extending her theory of commitment to political partisanship raises complex issues, particularly since her approach allows voluntaristic choice only after given reasons have run out, which may or may not apply to the formation of political commitments. It may be interesting to note how Chang indicates that commitments can arise without a conscious decision, and that they “need not be compelled by reasons,” although they “give rise to special reasons we might not otherwise have” (79-80). More generally, Chang’s description of the basic features of a commitment seems to reflect how many political partisans would describe their attachment to party. Nevertheless, her hierarchical ethic would seem to require at least a loosening of partisan ties to the extent that voluntaristic commitments should never override given reasons. This perhaps resembles the attitude of “ambivalent partisanship” advocated by Lavine, Johnston, and Steenbergen (2012). For further normative defense of partisan commitment see Rosenblum (2008); also see Mutz (2013); Ypi (2016).

evil.” However, there might also be an expressive motivation to abstain (a negative value in  $D$ ) since both candidates are positioned relatively far away from the individual’s ideal point—the definition of alienation. This could lead to ambivalence given that a choice must be made between the instrumental motivation to participate and the expressive motivation to abstain. For this type of hard choice, Chang’s hierarchical approach arguably requires that instrumental (given) reasons take precedence over expressive (voluntaristic) motivations, and the individual should therefore vote rather than abstain. This conclusion can be seen as making good ethical sense, especially assuming an interpretation of high social benefits in  $B$  (and a high value for  $p$ ), for it essentially holds simply that one should not give precedence to one’s own expressive motivations over other people’s instrumental utility. This ties back to the earlier argument regarding how instrumental motivations could give rise to a moral obligation to vote even under conditions of alienation.

To conclude, the foregoing has shown that while the Downsian differential may be useful for modeling indifference and (instrumentally-based) alienation, it is not necessarily coherent for cases of ambivalence, where ascribing a value to  $B$  through subtraction of expected utilities leads to a dubious prediction of abstention. The conventional manner of modeling the instrumental benefits of voting in order to assess the motivations for turnout can thus sometimes lose its meaning, as reflected in Chang’s critical approach, which asserts that—at least for some cases—“it is unclear how the rationality of preferences could be adequately modeled by standard utility functions” (Chang 2002, 666).<sup>25</sup> Nonetheless, while comparison of alternatives may be more

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<sup>25</sup> Chang continues, “Thus the approach to rational choice favored by mainstream social scientists will, at the very least, require reexamination” (Chang 2002, 666). Chang’s approach perhaps suggests that in some cases the assessment of instrumental benefits from alternatives on the ballot may be *additive*, rather than subtractive, since these benefits do not necessarily cancel out—yielding no motivation to vote—when they

complex than initially contemplated by Downs, expectations of instrumental benefits in voting do still have crucial implications for turnout choices and for practical voting ethics. An instrumentally rational assessment of benefits is in fact often directly relevant to the decision to vote or abstain, and this realist perspective helps underscore the ethical implications of choices between perceived political evils, as well as providing the beginnings of a case for a moral obligation to vote under some circumstances. Furthermore, conceptions of instrumental benefits are also important when they must be weighed against their expressive counterparts, where the argument has been made—based on Chang’s innovative approach—that instrumental benefits should always take precedence. A comprehensive approach to the interpretation of *B* should also take into account its potentially deep existential implications for personal, political, and rational identity. In sum, perceptions of the instrumental benefits of voting are crucial to the turnout decision in some very complex and significant ways, and they deserve greater attention than they have received thus far. Furthermore, a focus on the value of *B* in the calculus has important policy implications, as it points out specific directions for electoral reforms that aim to increase the perceived benefits of voting in order to boost voter turnout.

#### **4) ELECTION LAW AND POLICY IMPLICATIONS**

As demonstrated, instrumental benefits are critical to the motivations for voting, so finding ways to enhance perceptions of these benefits seems to present an obvious pathway for efforts to raise turnout.<sup>26</sup> To the point, as Matthew Streb writes in his wide-

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appear more or less equal, but may instead result in the intense ambivalence associated with a need to make a difficult yet important decision.

<sup>26</sup> Certainly not everyone agrees that increasing turnout is an important public policy objective, but for present purposes the goal of broadening electoral participation will be assumed. The fundamental question



ranging book on U.S. elections, “[I]f the goal is expanding the electorate..., the best way to do so is to convince people why they should vote, not simply make it easier for them to do so.” Streb accordingly emphasizes the importance of finding “ways to increase the benefits citizens see in voting.” He concludes, however, “How this can be done is difficult to say” (Streb 2011, 29). As noted, this indeed is a complex problem given that individuals can hold such widely varying opinions on whether participation seems instrumentally valuable or not in any particular election. Nonetheless, it is possible to broadly outline some of the ways in which election law and policy can be used to address the key attitudes that lead to abstention based on comparative assessments of the candidates or parties. The primary focus here is thus on avenues of reform that aim to reduce indifference and alienation as likely causes of *B*-based abstention, and on possible means of facilitating ambivalence to the extent that it is framed as an attitude that makes a decision to participate more likely.

The problem of indifference receives a great deal of attention in the voting literature, as it relates directly to the highly contentious topic of political knowledgeability. As indicated earlier, lack of information about the options on the ballot—or more precisely about the differences between them—is a more likely source of indifference than an informed perception that candidate positions are substantially equivalent. This should be especially evident in the current “hyperpolarized” (Pildes 2011) political environment in the U.S., where any convergence of party platforms toward the position of a median voter seems particularly absent, and so the bulk of genuine indifference is presumably traceable to information deficiencies. Richard Pildes in fact indicates that a potentially positive consequence of polarization—and the clear

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of whether higher turnout is normatively desirable is considered Chapter 3, with particularly reference to the informational costs of casting a minimally competent vote.

lack of convergence between the two main political parties today—is that it should make it easier for voters to use party affiliation to distinguish between candidates and thereby cast a more informed vote (329).<sup>27</sup> Electoral reforms to address indifference might therefore focus on the use of party cues or related heuristics to provide more information to prospective voters about the options on the ballot (Elmendorf and Schleicher 2013; Boudreau et al. 2015).<sup>28</sup>

In federal or major state elections, where party labels generally appear alongside candidates on the ballot, abstention due to genuine indifference should arguably not be that widespread.<sup>29</sup> The larger problem of such information-based indifference arises in elections conducted on a formally nonpartisan basis, which include some down-ballot state races and most local elections (see e.g. Schaffner and Streb 2002; Hajnal and Trounstein 2007, 88). Acquiring information about candidates in the absence of party cues is much more costly, particularly given greatly reduced media coverage and campaign spending in these lower profile contests. Providing a party cue on the ballot

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<sup>27</sup> Pildes identifies this approach as harkening back to earlier electoral theories of “responsible party government” (Pildes 2011, 329, citing Schattschneider (1942) and Raney (1954)). However, he also notes a major downside to polarization in that it makes effective governing through coalitional compromise much more difficult (Pildes 2011, 331). Along these lines, polarization may also contribute to alienation and functional indifference in individuals who identify as moderates but perceive both candidates as positioned far away from their ideal point (see *supra* n. 17).

<sup>28</sup> There is a forceful debate over whether cues and heuristics can facilitate more informed decision-making and increase the overall competency of the electorate (e.g. Popkin 1991; Lupia and McCubbins 1998), or whether these types of informational shortcuts are unable to compensate for fundamental deficiencies in political knowledge (e.g. Somin 1998; Hardin 2004). The working assumption for present purposes is that party cues can at least provide some useful information to counteract instrumental indifference, and that voters are in general “capable of providing useful feedback when armed with clear party labels” (Elmendorf and Schleicher 2013, 383). The basis for such an assumption is a matter for Chapter 3.

<sup>29</sup> This is not to suggest that instrumental indifference due to lack of information never leads to abstention in the presence of party labels. To the contrary, individuals without a coherent conception of the ideological positioning of the parties, or of their own ideal point, might still abstain as a result of genuine indifference in some federal or statewide elections with party labels. For example, Wattenberg et al. (2000) find that voters in presidential elections who “roll-off” in concurrently held House races are likely to do so as a result of lack of information. They find that up to 6 percent of presidential voters abstained in House races in California in the 1990s (239), while in one election in Los Angeles County almost 50 percent of voters rolled off to some extent (247).

reduces information costs while providing increased opportunity to perceive benefits associated with the outcome, so it could be doubly likely to motivate a decision to participate. Focusing on the perceived value of  $B$  in the calculus is thus particularly useful for models of turnout in “second-order” elections, which can be seen as attracting lower levels of participation due to their perceived lower political stakes, as indicated previously (Percival et al. 2007; Blais 2000, 43).<sup>30</sup>

Turnout in local elections is in fact exceptionally low, and the composition of the electorates at these lower levels of government is far more likely to be demographically biased by unequal participation among different socioeconomic groups (Hajnal and Trounstein 2005). There are many factors that influence the low levels of turnout in these races, including most prominently their “off-cycle”—separate from federal elections—scheduling, which requires greater benefits to offset the added costs as compared to when they are scheduled “on-cycle” (Anzia 2014; Wood 2002, 228).<sup>31</sup> However, low turnout in these elections can be partially attributed to the absence of party labels (Schaffner et al. 2001; Schaffner and Streb 2002; Garlick 2015). Allowing for partisan elections at lower levels of government, or at least providing some sort of ballot notations that function as “party-label substitutes” (Elmendorf and Schleicher 2013, 417), could boost turnout by reducing indifference-based abstention that results from lack of information.<sup>32</sup> As

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<sup>30</sup> See *supra* n. 5 and accompanying text. As suggested, one might also think that the perceived benefits of voting should be greatest in local elections, given an assumption that “local government is closest to the people and has the most direct and obvious impact on citizens’ lives” (Wood 2002, 210; see also Anzia 2014, 235 n. 3). However, under the altruistic/social benefit view it perhaps makes more sense for  $B$  to be perceived as higher in larger elections that affect greater numbers of people.

<sup>31</sup> Chapter 3’s focus on voting costs argues that state and local elections should generally be scheduled concurrently with federal races in order to reduce overall substantive (though not informational) costs of participation. A complementary argument implied here for on-cycle scheduling is that lower overall benefits are then required to motivate individuals to turn out, although of course this does not mean they will participate in all races (see Aldrich 1993, 261).

<sup>32</sup> Extending national party brands to subnational levels can be problematic, and there might be good reasons for keeping some second-order elections nonpartisan. Elmendorf and Schleicher (2013, 412-416) discuss in detail how election law reforms can address some of the problems with the use of party labels at

Christopher Elmendorf and David Schleicher explain, laws that dictate how candidates appear on the ballot can be crucial in determining the informational costs of voting; correspondingly, it is also worth recognizing how these laws can have significant effects on perceptions of voting's benefits.

While genuine indifference based on lack of information is likely to be common in second-order elections and down-ballot races, the functional indifference that may arise as a result of alienation is presumably a more widespread cause of abstention even in first-order elections. As discussed previously, alienation can make any instrumental differences between options on the ballot seem negligible or meaningless, and generally unworthy of any participatory response. This type of indifference is probably not associated with any informational deficiency. Alienated abstainers in American elections, for example, may have more than enough information to distinguish between candidates of the two major parties, yet they perceive both candidates to be positioned so far away from their own ideal point that any differences are discounted as inconsequential. Since  $B$  seems effectively equal to zero, it would not be instrumentally rational to participate even if voting were completely costless ( $C=0$ ). Alternatively, alienated individuals may have strong expressive reasons for not participating in particular elections, perhaps based on normative ideals of democratic theory that they find contravened by the existing political structure. As a result, any small but positive value in  $B$  is likely to be outweighed by a significantly greater negative value in  $D$ . These individuals may arrive at conclusions of functional indifference and/or expressive disdain through many different routes, but they share a common belief that the broader political structure surrounding the election makes the choice presented on the ballot essentially meaningless, and voting is thus completely

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local levels. Streb maintains that a partisan affiliation should be indicated in all races on the ballot, although he argues for elimination of elections for many lower-level political offices (Streb 2011, 80).

useless—or at least highly ineffective—as a means of democratic participation. This belief, if widespread enough, arguably presents a much greater policy problem than indifference due to lack of information, as it potentially challenges core democratic legitimacy. How might this deeper problem be addressed within a reform framework focused on perceptions of the benefits of voting?

One way would be to focus on the “supply side” of alienation by looking for institutional reforms to counteract what Schattschneider refers to as the displacement of political conflict. Such reforms would aim generally at redrawing lines of political cleavage in a more inclusive manner by framing electoral choices in a way that incorporates the concerns of greater numbers of citizens. A far-reaching approach to addressing alienation this way could include systemic reforms to replace majoritarian/winner-take-all institutions with more “consensual” forms of constitutional design—such as proportional representation in elections, and perhaps even a parliamentary executive or other institutional reforms to facilitate political coalitions and increase the viability of smaller parties (see Lijphart 2012). However, such a drastic approach seems highly impractical for the United States, as institutional reforms this extreme are presumably unlikely to occur—at least in the near term—given the deep entrenchment of majoritarian democratic norms in this country. A movement toward ranked choice (or “instant-runoff”) voting, in which a majority winner is determined by having voters rank-order preferences for ballot options, is perhaps somewhat more realistic. These electoral systems could potentially reduce alienation-based abstention by encouraging candidates to run outside the two main parties and by allowing individuals to

cast votes for these candidates without “wasting” their vote or perhaps increasing the likelihood that a lesser preferred candidate could win (see Streb 2011, 155-156).<sup>33</sup>

While these types of electoral system reforms might help reduce functional indifference as a cause of alienation, they likely would fail to address more expressive reasons for abstaining, such as perceptions of pervasive corruption and fundamental unfairness in the political system. Robert Post explains how “electoral integrity” requires a general sense of “public trust that elections select officials who are responsive to public opinion,” because all democratic participation seems effectively meaningless under conditions of political inequality with politicians seen as responsive only to wealthy individuals and interests (Post 2014, 60). Post thus advocates for basic changes in campaign finance law from a perspective of constitutional interpretation that aims at increasing the perceived benefits of voting by counteracting alienation from politics and instilling a greater sense of trust in American democracy.<sup>34</sup> This is perhaps a salutary goal, but again it appears somewhat impractical—at least in the short term given current Supreme Court jurisprudence. Furthermore, eliminating corruption and unfairness—or the appearance thereof—to the satisfaction of alienated citizens is perhaps an impossible undertaking. Are there any prospects for addressing alienation-based abstention within the current system as it stands?

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<sup>33</sup> Streb also advocates relaxation of ballot access laws to make it easier for outside candidates to gain access to the ballot (Streb 2011, 185). The practice of including “none of the above” as a ballot option—as in the state of Nevada and a few countries around the world—could provide another outlet for expressive alienation (see Damore et al. 2012). However, adding this option fails to address functional indifference, as it doesn’t affect the instrumental benefits of voting, and choosing this option is in fact formally equal to abstention. More importantly, this reform fails to target the deeper policy problems posed by alienation.

<sup>34</sup> Dennis Thompson’s broad conception of upholding “free choice” in elections can also be seen to aim at improving perceptions of the benefits of voting and addressing sources of functional and expressive alienation. Thompson endorses sweeping reforms to campaign finance as well as electoral system and ballot rule changes (Thompson 2002, 65-122).

As Streb suggests, more attention can be paid to the policy problem of finding ways “to convince people why they should vote” (Streb 2011, 29). Hence, difficult as it might seem, it may be important to focus also on the “demand side” of political alienation. What type of motivations could possibly influence the turnout decisions of highly disaffected citizens in the absence of institutional reform? The answer suggested by the turnout calculus calls attention to the fact that any difference in negative expected utilities yields a positive value in  $B$ , and even if that differential seems extremely small, it may in fact amount to a major effect on the welfare of vast numbers of people.<sup>35</sup> This argument thus emphasizes the exactly rational logic of choosing a lesser evil when faced with a decision in which all viable options seem bad. As discussed, even when candidates from the two major parties both seem downright detestable, it may nevertheless be instrumentally *irrational* to abstain in a competitive election where not voting could conceivably contribute to a perceived greater evil taking hold. This argument highlights how democratic politics in practice often requires making the best of bad conditions and remaining realistically pragmatic, even coldly calculating when necessary.<sup>36</sup> More broadly, this principle reflects how everyday life often forces individuals to make choices they would rather not make, and it indeed takes serious intellectual and emotional rigor to face up to these difficult decisions in a rational manner aimed at furthering one’s life goals.

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<sup>35</sup> Admittedly, there is not much that can be done to convince a deeply alienated but narrowly self-interested individual who does not allow for a sociotropic interpretation of  $B$ . In any event, such a *homo economicus* would probably hold strictly by pivotal theory and believe that an individual vote can never affect the outcome of a large election (i.e.,  $p$  is always infinitesimal), which moots the entire discussion of instrumental benefits.

<sup>36</sup> Thompson indicates that being forced to choose among evils amounts to an abridgment of the democratic value of free choice in elections (Thompson 2002, 70). Nevertheless, the fact remains that political choices must often be made under less than ideal conditions. Incidentally, the importance of lesser evil voting can perhaps be seen in the prevalence of negative campaigning, which basically expresses the sentiment: “You may not like me, but don’t let this other candidate win, she/he is much worse!”

Beyond cold rationality, however, the further implication of this argument is that there may sometimes be a *moral obligation* to vote even under conditions of extreme alienation; moreover, by failing to participate an individual may incur moral culpability in the event that the greater evil prevails. As discussed, this involves extending the sociotropic interpretation of *B* to derive a responsibility-based approach to turnout and vote choice, as suggested by Beerbohm's conception of democracy as a system of shared liability. This approach recognizes how the perceived value of voting can be enormously high, and that there may be potentially onerous responsibilities associated with democratic elections. This does not imply that individuals should vote when they are truly indifferent, either through lack of information or through alienation, for any vote choice under such conditions would certainly not seem very rational.<sup>37</sup> Nevertheless, the argument here draws attention to the need to distinguish between forms of instrumental indifference and expressive alienation, and it emphasizes the very hard choice that may be posed when instrumental and expressive motivations conflict. If Chang's normative argument is correct, then instrumental motivations for voting (positive value in *B*) should generally prevail, while expressive motivations for abstaining (negative value in *D*) must sometimes go unheeded. In other words, as a responsible democratic citizen—and more broadly as a mature adult—one must occasionally “hold one's nose” and do what seems right for the greater good.

Finally, the implications of this approach for attitudes of ambivalence are not directly associated with efforts to make partisans act more independently and be more deliberatively ambivalent with their vote choices. While promoting more reasoned

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<sup>37</sup> There might even be a duty to abstain under conditions of true indifference, as discussed in Chapter 4 regarding the limits of a civic duty to vote. As discussed, however, indifference must be distinguished from ambivalence, under which it may in fact be possible to make a voluntaristically rational choice, as Chang asserts. Whether there should ever be a duty to vote (voluntaristically) under conditions of ambivalence regarding vote choice is a more complex question beyond the current scope.



judgment among committed partisans may be commendable, these are obviously not the types of individuals likely to abstain from voting. Instead, the emphasis here should be on trying to convince those who are alienated to be more ambivalent about their motivations for abstaining. This requires drawing attention to the distinction between instrumental and expressive value in voting, which is in fact a basic lesson of the turnout calculus. By distinguishing conceptually between these two kinds of expected utility, the framework of the calculus sets the stage for a normative argument that may require subordinating one's personal expressive inclinations, based on a recognition of the potentially far-reaching societal effects of even small instrumental differences between major candidates on the ballot. At the very least, such an argument would advise alienated individuals to be more ambivalent when choosing between these conflicting motivations, with the suggestion that such conflict could create a hard choice that might present a situation of parity between the alternatives. In such case, one might make a voluntarist decision about one's rational identity with respect to politics: One can define oneself as someone who places the instrumental welfare of others in front of personal values and ideals about politics and democracy, or as someone who insists on expressing those principles by abstaining from voting notwithstanding the potential harm to others.<sup>38</sup>

Admittedly, this approach may require alienated individuals to reconsider some of their basic ideas about purpose and meaning in democratic politics. One might say it requires a willingness to relinquish certain democratic dreams and devotions, while instead taking a less "romanticized" view of the role of elections in the democratic process (Pildes 2014), and perhaps abandoning some aspects of democratic "faith"

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<sup>38</sup> This formulation of the decision is admittedly biased in favor of Chang's theory, which requires giving precedence to instrumental reasons, but it is not meant to imply that the choice between instrumental and expressive motivations should be an easy decision to make. See Haferkamp and Ran (2016) for a discussion of the construction of civic identity and its relation to the motivations for political participation.

(Deneen 2005). In general, this approach suggests the need for a more minimalist and less “radical” democratic theory (Gardner 2003), which entails an embrace of mass representative democratic forms even if they appear to fall short of deliberative epistemic ideals (Chambers 2009).<sup>39</sup> This requires a realism that acknowledges how democracy in practice often generates very difficult decisions in the form of “tragic” choices or tradeoffs (Gardner 1996, 451; Pildes 2014, 850). Perhaps most importantly for present purposes, this approach grounds an appreciation of voting as a fundamentally valuable form of democratic participation notwithstanding any of its alleged deliberative deficiencies (see Mackie 2011). The aim is thus to coax even highly alienated individuals into admitting that the policy choices made by different elected officials from different political parties really can and do affect the day-to-day lives of great numbers of ordinary people, for better or for worse. The basic argument is simply that elections matter.

In sum, exploring the instrumental benefits of voting through the framework of the rational choice calculus points toward several reforms aimed at increasing turnout through electoral system design and ballot structure, but perhaps the more novel aspects of this analysis have to do with the ethics of abstention and the possibility of a moral duty to participate.<sup>40</sup> Although the suggestions here for conceptualizing alienation and ambivalence do not amount to concrete proposals for reform, they do offer a well-reasoned normative framework around which to formulate electoral policy. This is essential, because sound democratic practices demand sound democratic theory. Even where there is profound disagreement as to theoretical foundations, as there is bound to

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<sup>39</sup> Chapter 3 explores the requirements and implications of a more participatory approach in democratic theory as it relates to conceptions of voting competence and their links to election law and policy.

<sup>40</sup> This analysis of the instrumental benefits of voting is also critical for building a theoretical foundation to justify a legal regime of compulsory voting (see Hill 2014, 177). The broad question of whether voting should be structured as voluntary or compulsory is discussed in detail in Chapter 4.

be in this area, these disputes call out for more principled public debate, for the alternative is to allow elections to stay subject to the vagaries of partisan manipulation. Indeed, many important policy problems—particularly in the area of voting and elections—cannot be solved through empirical analysis alone, as they require some affirmation of basic theoretical principles. The normative ideals of democratic politics are part and parcel of election law and policy, and they are worthy of more focused attention in legal and political science scholarship.

## 5) CONCLUSION

Jean-Jacques Rousseau writes in *The Social Contract*, “As soon as any man says of the State, *What does it matter to me?* The State may be given up for lost.” (Rousseau 1920 [1762], 83). The perceived benefits of participating in democratic elections are certainly a critical part of individual judgments about whether and how the state matters, and the formation of such judgments is an important topic of study. This chapter has outlined a general approach to the difficult problem of conceptualizing the instrumental benefits of voting by utilizing the rational choice calculus of turnout to frame an inquiry into the expected utility differential from a comparison of ballot options. Distinguishing and clarifying three typical attitudes that tend to influence the perceived value of  $B$  in the calculus—indifference, alienation, and ambivalence—has helped to identify directions for law and policy to address perceptions of benefits with the purpose of preventing abstention and increasing voter turnout.

The first point has been that in contemporary American elections, true instrumental indifference—a zero value for  $B$  based on a perception of no actual difference between the two main candidates/parties—is most likely to emerge from lack

of information. This condition essentially precludes any engagement with the turnout calculus, or the electoral process at all for that matter. Policy reforms have therefore been suggested to reduce indifference by providing informational cues on the ballot, particularly through party labels in second-order elections where basic information seems most lacking. Alienation, by contrast, is generally not related to lack of information, and there may be potentially good reasons for alienated individuals to decide to abstain. Modeled spatially as the perception of great distance between the individual's ideal point and the points of both candidates/parties, alienation often results in what has been termed functional indifference, where any observed distinction between the candidates/parties is interpreted as effectively meaningless. Looking to the "supply side" of alienation, reforms have been suggested to improve perceptions of meaningful electoral choice, but they generally involve fairly radical changes to the electoral system or to constitutional design and interpretation. From a practical perspective, attention must turn to the "demand side" of alienation, with efforts to promote a conceptual distinction between functionally indifferent alienation, which is instrumentally relevant, and the expressive elements of alienation, which by definition are not. This leads to a discussion of the ethics of voting for lesser evils, and the possibility of a moral obligation to participate even under conditions of alienation, given a high enough potential for collective utility or disutility associated with an election outcome.

Finally, with regard to ambivalence, the rational choice model of *B* in the calculus has been shown to have limits as an explanation of voter turnout. In particular, the Downsian differential does not account for the possibility of conflicting assessments of expected benefits that pull in opposite directions with regard to vote choice, but which do not necessarily result in any hesitation regarding the turnout decision. In fact, notwithstanding the apparent difficulty that ambivalent individuals may have in deciding

*how* to vote, they are in fact likely to be highly informed and engaged with electoral politics, and their decision *to* vote will seldom be in doubt. An inquiry into the question of how vote choice can be resolved under conditions of ambivalence led into a discussion of the rationality and the ethics of facing up to hard choices. The emerging theory of voluntaristic decision-making touches on deep and complex issues of personal and political identity, with broad implications for the ambivalence that may result from the clash of instrumental motivations to vote with expressive motivations to abstain. In general, ambivalence has been portrayed in a more positive light than indifference or alienation, as it not only suggests a more reasoned and deliberative attitude toward a particular decision, but promoting ambivalence may also be particularly useful in attempts to persuade alienated individuals to reconsider a decision to abstain.

A primary focus of this approach has dealt with the ethics of interpreting *B* under democratic norms of shared liability, with the aim of motivating participation based on a suggestion of moral culpability that may derive from a responsibility to prevent bad (or worse) outcomes. Yet it is also worth emphasizing how this evaluation of instrumental benefits also implies opportunities for doing real collective good and conceivably earning a share of civic pride and deserved praise for contributing to a positive democratic result (see Beerbohm 2012, 282; see also MacMullen 2014, 78). Admittedly, such opportunities might not seem too common, and many of the most alienated individuals will likely never perceive anything but negative utility associated with election outcomes, at least under the current U.S. electoral institutions and political system. As indicated, the approach advocated here does imply some fundamental normative assumptions relating to the limitations of democratic elections, and it may often require a certain stoic realism and lowering of expectations for political processes and outcomes. This is not a particularly novel perspective, however, nor does it necessarily ask too much of citizens, as it reflects

an approach that many democratic theorists would likely endorse. As Elizabeth Theiss-Morse and John Hibbing (2005, 227) write, “Good citizens need to learn that democracy is messy, inefficient, and conflict-ridden.” They therefore conclude, “The route to enhancing meaningful civic life is not badgering people to become engaged because politics is fun and easy; it is asking people to become engaged because politics is dreary and difficult” (245).

More generally, this approach draws on a minimalist line of theory that traces back to Schumpeter and finds more recent expression in works like Bernard Crick’s *Defence of Politics* (1993), which frames the electoral process as simply a venue for fairly facilitating the peaceful conciliation of social groups with fundamentally conflicting interests or beliefs. This is diametrically opposed to the view that elections can be modeled as ideal decision-making processes designed to meet certain epistemic criteria, which as discussed in Chapter 3, is a view that seems doomed to yield skepticism and cynicism regarding the potential value of voting. The view here thus advocates for a general reassessment of attitudes of indifference, alienation, or ambivalence before any decision to abstain from voting based on a judgment of insufficient instrumental benefits. Crick writes of this eloquently in a passage that touches on all these attitudes:

“Many people...think that they are not interested in politics, and even act as if they are not; but they are probably few compared to the many who think that politics is muddled, contradictory, self-defeatingly recurrent, unprogressive, unpatriotic, inefficient, mere compromise, or a sham or conspiracy by which political parties seek to preserve some particular and peculiar social systems against the challenge of the inevitable future, etc.” (Crick 1993, 16).

Yet Crick nevertheless insists, “We can do much worse than honour ‘mere’ politics” (33).

Likewise, we can arguably do much worse than to honor “mere” voting, and to pursue law and policy reforms in that spirit. This work thus forms a key part of an overall defense of voting as an exceptionally valuable—and perhaps quintessential—form of political participation. Other ways of participating in politics may well be important and useful, but electoral participation will always occupy a place of primacy in democratic theory and practice, which necessitates attention to the perceived value of voting. This clearer understanding of instrumental benefits within the framework of the calculus has paved the way for studying the costs of voting, as well as crucially important perceptions of non-instrumental, or expressive benefits, and the wide-ranging problems of law and policy relating to the effects of electoral institutions on voter turnout. By drawing attention to these important issues, this work can hopefully make a valuable contribution to the ongoing critical evaluation of the theory and practice of electoral democracy in the United States and elsewhere.

## **Chapter Three: The Costs of Voting—Bridging Theory and Practice**

“The greatness of democracy is that it denies nothing and renounces nothing of humanity.”  
–Victor Hugo (1987 [1862], 517)

“Democracy was made for the people, not the people for democracy.”  
–E. E. Schattschneider (1960, 135)

### **1) INTRODUCTION**

What are the costs of casting a vote, and how and why do these costs matter? Employing the framework of the calculus of voting, this chapter examines the legal and policy implications of varying theoretical perspectives on the costs of participating in democratic elections. Assessments and interpretations of the costs of voting not only implicate important practical problems in election law and policy; they simultaneously involve crucial normative issues in democratic theory. This chapter seeks to integrate these two perspectives through a unified analytical focus, which it does by employing the concept of voting costs as a link between electoral institutions and the norms of liberal representative democracy. As mentioned in the introduction to this dissertation, and as discussed below, theory and practice in election law and policy appear to be suffering from something of a “disconnect,” as evidenced on the one hand by the intense partisan conflict surrounding electoral rules and procedures, and on the other by the dearth of guidance from existing legal doctrine concerning individual voting rights and government responsibilities for election administration. This work represents an attempt to address this disconnect by examining these issues through the lens of voting costs.



The costs associated with the act of voting—represented by the  $C$  term of the voting calculus—can be difficult to measure or assess, and they are subject to wide variation and uncertainty from at least three sources: First, voting costs vary significantly as an empirical matter related to institutional differences in election law and policy, as implemented through particular rules and procedures of election administration. Second, the evaluation of voting costs and their effects on turnout decisions in the calculus is a function of the subjective perspective of individuals deciding whether to participate in a given election, which may involve highly idiosyncratic assessments. Third, the normative characterization of voting costs—and in particular the interpretation of the costs of voting “well,” or at least competently—is a matter of contentious debate, and so any attempt to describe what these types of costs actually entail in theory or in practice will not be simple.

The costs of voting can be divided into two general categories: *substantive* costs and *information* costs (Aldrich 1993, 248; Dowding 2005, 446). Substantive costs represent the administrative and logistical burdens of electoral participation, including registering as required, accessing the polling place or otherwise obtaining and casting a ballot, as well as any time or opportunity costs attributed to the act of voting. Information costs, on the other hand, reflect the evaluative and decisional burdens faced by individuals in obtaining and using information to assess the options on the ballot and choose how to vote. These are the types of costs that were first formulated by Anthony Downs as subject to the now well-known theory of “rational ignorance” (Downs 1957a, 246). The costs of information are generally considered more significant from the perspective of normative theory, even if they are not viewed empirically as strongly determinative of turnout decisions within the calculus (see Dowding 2005, 447; Somin 2006, 258-259). As noted, the characterization of information costs raises complex

issues, for interpretations of these costs implicate intense and long-running debates about whether mass democratic electorates have the knowledge and reasoning abilities deemed necessary for competent use of the ballot.

This chapter explores opposing schools of democratic theory that frame the dominant approaches to understanding the functions and abilities of voters under modern political conditions. The fundamental dispute about the purpose and meaning of mass electoral participation is shown to motivate opposing positions in the voter competence debates, yielding wide differences of opinion about the costs of casting a reasonably informed vote. The chapter will then proceed to demonstrate how these fundamentally different views about *information* costs have important policy implications for current problems in election law and administration related to *substantive* costs. These range from constitutional level issues involving institutions of representational versus direct democracy and voting rights; to the so-called “nuts and bolts” (Lowenstein 1999, 1202; Hasen 2001, 378) of election administration, including registration and documentation requirements, convenience voting reforms, and other rules and procedures that affect the costs of casting a ballot; to procedural problems particular to “second-order” elections, such as whether to hold local races concurrent with or separate from higher-turnout national contests. These theoretical debates over the information costs of mass democracy may also illuminate the ongoing political battles over the rules for voting in U.S. elections—what Richard Hasen has termed, “The Voting Wars” (Hasen 2012).

As discussed in this dissertation’s introduction, the issues raised by a focus on voting costs are clearly highly charged politically, particularly in the polarized environment currently dominating American politics, where changes to electoral rules are generally perceived as intended to influence the outcomes of elections and the distribution of political power (Hasen 2012, x; Levitt 2014, 1787; Tokaji 2009b, 133;

James 2011, 225-227). Furthermore, beyond the partisan struggles over the implementation of specific voting costs there is a more principled debate over where the power to determine the rules for voting should reside. State and local authorities continue to fight to maintain the historically “hyper-decentralized” (Tokaji 2009b, 146) administration of American elections against perceived federal encroachment (see Hasen 2012, 7), while scholars consider whether greater uniformity should be established through new federal laws and administrative procedures (Hasen 2005, 969; Tokaji 2014, 100-104; Ewald 2009).<sup>1</sup> This debate may in fact date back to the founding era, as demonstrated by the somewhat ambivalent Elections Clause of the U.S. Constitution, which gives initial authority to the states to regulate the “Times, Places, and Manner” of federal elections, but then gives Congress the power to “at any time by Law make or alter such Regulations.”<sup>2</sup>

It might thus seem pointless to probe for foundational normative principles underlying these complex and highly politicized debates. However, while understanding that reaching consensus may be difficult or even impossible, these issues are nevertheless important to study and discuss. There may even be some reforms to which opposing theoretical schools can agree (see Cain 2015, 199-200), or opportunities for partisans to reach political compromises (Tokaji 2014; Hasen 2005, 969). Scholars should not evade these important issues simply because they are politically sensitive or philosophically contentious. The central premise of this chapter—and indeed of this dissertation as a whole—is that electoral institutions represent democracy in action, and that research in

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<sup>1</sup> Hasen and Tokaji suggest new federal standards to provide increased uniformity (see *infra* n. 82), while Ewald generally defends existing patterns of decentralization and local control over the administration of elections.

<sup>2</sup> Article I, Section 4. The case of *Arizona v. Inter Tribal Council* 133 S. Ct. 2247, 2253 (2013) emphasizes the broad federal power to preempt state regulations under the Elections Clause, but see *infra* n. 82 for questions regarding the reach of federal authority in this area.

law and policy may be particularly well suited to bridging the gap between democratic theories and practices (see Gardner 2012, 690). Election laws and policies—from Supreme Court doctrine down to the actions of state and local administrators—are inevitably linked to basic democratic values and ideals, and so any critical evaluation of electoral institutions requires fundamental normative assumptions about the meaning and purpose of voting in a system of representative democracy (Thompson 2002, vii-viii; Gardner 1997, 897; McCaffery et al. 2004, 9).

While political scientists have extensively examined electoral institutions in the United States and elsewhere for empirical effects on voting behavior and political outcomes, they have focused far less on exploring how basic assumptions in democratic theory serve to undergird the choices of rules and procedures for participating in elections (Gardner 2012, 691). The primary emphasis of institutional analysis in political science has thus focused mostly on how and whether institutions “matter” to political outcomes, rather than exploring their normative foundations (e.g. Norris 2004; Przeworski 2004).<sup>3</sup> Political theorists have been somewhat more open to the idea that democratic theory should have consequences for the design of electoral institutions (e.g. Estlund 1990, 402; Kelly 2012, 97; Rehfeld and Schwartzberg 2013, 56; Beitz 1989, 4), but they too have often failed to draw clear connections between normative ideals and specific institutional reforms (see Waldron 2013, 6; Peonidis 2013, 37; Beitz 1989, ix). Those who do suggest reforms often focus mainly on campaign finance or high-level institutional design (e.g. Kelly 2012, 97-120; Rehfeld and Schwartzberg 2013, 58-60),<sup>4</sup> or they may suggest

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<sup>3</sup> But see March and Olsen (1986), as well as Lowndes and Roberts (2013, 187), in support of a more normative focus for institutional analysis in political science.

<sup>4</sup> Kelly advocates for increasing the number of political parties and for campaign finance reform, as well as robust judicial review and reforms in public education, while Rehfeld and Schwartzberg recommend alternatives for the design of electoral constituencies and new non-electoral forms of accountability. See also Shapiro (2003, 108-112), advocating for reforms to increase political competition and economic

relatively extreme changes that reach beyond the existing institutional framework of liberal representative democracy (e.g. Landmore 2013, 117; Peonidis 2013, 38-47; Fishkin 2009, 13-15; Beerbohm 2012, 257-274).<sup>5</sup> The essential relationship between different schools of thought in democratic theory and specific democracy-implementing institutions of election law and policy is thus an understudied area in both positive and normative scholarship on electoral institutions.<sup>6</sup>

Legal scholarship has generally focused more attention on these gaps between democratic theory and practice, presumably because the need for normative fundamentals has been so readily apparent to scholars analyzing and critiquing judicial decisions on election law (Michelman 1989, 444; Pildes 2001, 696; Charles 2002, 1107; Gardner 2015, 62). Many—if not most—election law scholars thus explicitly fault the Supreme Court’s jurisprudence for lacking the doctrinal coherence necessary for principled application of the “law of democracy” (Karlan 1993, 1708; Issacharoff and Pildes 1998, 644; Gerken 2002, 1413; Charles 2007, 602; Schultz 2014, 7; Gardner 2015, 61).<sup>7</sup> However, the relatively few efforts to offer more comprehensive theories and

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redistribution—including campaign finance reform, reducing veto points, and proportional representation—as well as “political antitrust measures” that include nonpartisan regulation and administration of elections.

<sup>5</sup> Landmore, as discussed later in this chapter, endorses random selection of political representatives—or sortition—as preferable to holding elections, while Peonidis suggests direct democratic participation in legislation through randomly selected citizen assemblies, and also partially endorses sortition, in addition to other reforms. James Fishkin famously advocates for new institutions of deliberative democratic participation over traditional institutions said to yield “debilitated” or “unrefined” public opinion, and Beerbohm goes even further in suggesting non-secret voting, advisory citizen juries, and other non-electoral forms of participation, while also discussing limits on judicial review and its supremacy in constitutional interpretation.

<sup>6</sup> Thompson (2002) provides a notable exception as a work of political theory that draws specific implications for various issues in election law and policy. See also Cain (2015) on the implications of “pluralist” versus “populist” reform agendas for different aspects of voting rules and procedures.

<sup>7</sup> A few scholars do maintain it is better for the Supreme Court to avoid “lockins of particular theories of representation” (Cain 1999, 1590), or that the Court should avoid precise legal standards in cases that involve a “controversial... normative political theory” (Hasen 2002, 1473; see also Lowenstein 2002, 283). The term “law of democracy” can be attributed to the title of the election law casebook by Issacharoff et al. (2016).

accompanying institutional arrangements have tended to address the so-called “second generation” of voting rights issues (see Guinier 1991, 1094; Karlan 1998, 122), which involve aggregate or “structural” representational interests—such as gerrymandering or other forms of vote dilution—or to focus generally on campaign finance and other candidate-oriented areas of election law (e.g. Issacharoff and Pildes 1998; Gerken 2001, Charles 2007; Gardner 2009; Post 2014).<sup>8</sup> Somewhat neglected have been the theoretical underpinnings for cases raising “new vote denial” issues (see Tokaji 2006, 691-692)—such as challenges to voter identification laws or other administrative procedures claimed to burden voting rights. These issues are seen as representing a return to “first-generation” claims involving interests in participation (Tokaji 2006, 718), which invite a more individualized approach to rights adjudication than the structural interests at stake in vote dilution cases (see Fishkin 2011, 1290). In particular, the literature is largely lacking any coherent normative theory of vote denial that would entail stricter protection of the right to vote at the individual level, and which could lend support to electoral reforms aiming to minimize substantive costs in order to raise turnout and broaden electoral participation.<sup>9</sup>

In fact, scholarship in election law and policy contending that major reforms to U.S. election law and policy are needed to increase and equalize voter turnout may appear to have neglected somewhat the need to fully explicate normative theories in

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<sup>8</sup> Issacharoff and Pildes set forth a competition-based “structural” theory of democratic politics and draw implications for ballot access, campaign finance, and vote dilution, while Gerken discusses normative theories of vote dilution and structural conceptions of voting rights, and Charles develops and applies a theory of institutional distortion caused by gerrymanders. Works by Gardner and Post deal mostly with theoretical foundations for campaign finance and other regulatory issues involving candidates and parties.

<sup>9</sup> Joseph Fishkin appears to be one of the few legal scholars to have formulated a comprehensive theory that supports the individual interest in electoral participation, which he derives from norms of inclusion and equal citizenship (Fishkin 2011, 1333). Other proposals for normative theories applying to cases alleging vote denial rely mainly on structural concerns related to election outcomes, rather than individual-level voting rights claims (e.g. Stephanopoulos 2014, 325; Gardner 2009, 181; see also Posner 2003, 202, 222).

support of their participatory proposals (see e.g. Overton 2006; 14-15, 168-169; Wang 2012, 1-13; Sample 2015).<sup>10</sup> Suggestions for reform of judicial procedure in election law cases or accountability-based policy reform may also appear to have overlooked the need for normative theory (see e.g. Hasen 2009; Gerken 2009).<sup>11</sup> In particular, proponents of reforms to reduce the administrative burdens of casting a ballot have not adequately addressed counter-arguments for higher voting costs intended generally to improve democratic competence—arguments that potentially militate against a strongly protected individual interest in participation. Those who favor making the voting process easier may tend to summarily dismiss such arguments out of hand, claiming that raising costs to improve competence is structurally inequitable or motivated by partisanship (Wang 2012, 7-8; Hasen 2005, 971; Cain 2015, 175). In fact, Hasen goes as far as asserting that “little can be said” against arguments for higher costs in the name of voting competence, as differences on this issue seem to represent “an irreducible ideological divide” (Hasen 2005, 972).<sup>12</sup> However, even if consensus on this topic remains elusive, there is still

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<sup>10</sup> The works by Overton and Wang each describe administrative burdens on participation and argue for law and policy reforms to increase turnout, but they provide only limited theoretical background for their analyses and proposals. Sample likewise proposes participatory reforms without detailed discussion of normative foundations. Overton has in fact written elsewhere of how “inclusionary” versus “merit-based” assumptions in democratic theory support different legal approaches to the administrative burdens on participation; however, he identifies merit-based approaches with an “individualized focus,” which he rejects because it “fails to recognize that politics involves not simply individual rights but also associational and structural concerns” (Overton 2001, 473-480). In contrast, the argument of this chapter is that merit-based approaches can and should be rejected on individual rights grounds, and that an individualized focus can also support inclusionary practices in law and policy.

<sup>11</sup> Hasen argues for a canon of statutory construction in favor of voter enfranchisement, but he appears to omit discussion of any basis in democratic theory for this rule of judicial interpretation. Similarly, Gerken’s work proposes performance measures to rank state and local administrative procedures, but it does not seem to discuss theoretical foundations for any standards of best practices. See Elmendorf (2010, 1058); Kang (2009, 795).

<sup>12</sup> Hasen elsewhere refers to a conflict between liberals and conservatives about the purpose of voting in a democracy, stating, “Conservatives see voting as about choosing the ‘best’ candidate or ‘best’ policies... and liberals see it as about the allocation of power among political equals” (Hasen 2014). This substantive distinction comes close to the approach of this chapter, as detailed below, but it is not so clear that this division separates neatly along conservative/liberal lines, notwithstanding the clear partisan rift on these matters in practice (see *infra* n. 77). Nevertheless, the assertion that efforts to make voting more costly

much that *can*—and arguably *must*—be said to counter proposals for higher costs in the name of democratic competence. It is important to recognize that such proposals may actually draw support from empirical research on political knowledge levels and from prominent theories of the role of voting in democratic theory.<sup>13</sup> Opposition to such arguments ought therefore not be taken for granted; their underlying reasons and principles should be directly addressed.

In sum, there is a pressing need—in the courts, in the academy, and in the general public discourse—for increased attention to the normative foundations of election law and policy. This chapter points in that direction through its focus on individualized assessment of the costs of voting in the calculus of turnout. In seeking foundational principles behind varying interpretations of voting costs, this work engages in a broader project of analyzing electoral rules and procedures through what Dennis Thompson calls institutional political theory, which “seeks principles informed enough by actual practice to connect to political agents, but detached enough to provide a critical perspective on their actions” (Thompson 2002, ix). Regardless of whether it may ever be possible to reach consensus on the normative principles or the legal and policy implications suggested in this chapter, this approach of this work could still prove useful. In Thompson’s words: “[T]he point of institutional theorizing is not to force choices

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represent a conservative—even a reactionary—position does have a sound basis in historical perspective, given the extended record of voting restrictions in the U.S., and the slow, unsteady progression toward the universal franchise in this country (see Keyssar 2000).

<sup>13</sup> See generally Sections 3 & 4 below. For a specific discussion of how legal theory may support ensuring competence through voting rules, see Michelman 1989 (450-452, 480-485), describing “dialogic” conception of deliberative democratic politics, and its possible support for standards of competence to ensure the “constitutive value” of voting as engagement in political dialogue. See also Ortiz (2004, 210, 221-222), suggesting that higher voting costs may be useful for “discouraging unthoughtful participation,” but concluding that this approach is problematic from a structural perspective, since the resulting electorate may be “more thoughtful but at the same time less representative.”



between theories, but to facilitate interpretations of the principles themselves” (id.).<sup>14</sup> In this manner, focusing on the institutional implications of differing interpretations of voting costs could contribute to a more deliberative conversation about election law and policy, perhaps even with the potential to transcend some of the entrenched partisan positions and interests in this area (see Thompson 2002, 186-187; see also Ewald 2012, 196).<sup>15</sup>

This chapter proceeds as follows: Section 2 provides a background on the varieties of substantive voting costs in American elections and reviews some of the political science literature on their empirical effects. Although substantive costs are subject to wide variation in practice, and their empirical effects on voter turnout are matters of debate, these costs have generally not been viewed as highly determinative to the calculus of voting, and their normative significance has not been fully explored. Information costs, which are discussed in Section 3, have generally been viewed as more important from a theoretical perspective, as indicated above. While these costs also exhibit wide variation, they are subject to a more fundamental assessment problem due to underlying normative uncertainty about what the informational costs of voting actually entail. The discussion of these costs thus proceeds with a view toward debates on voter competence and how information costs are characterized by different strands of research on the political knowledge and reasoning abilities of American citizens.

In order to address the fundamental question of what kind of knowledge, and how much of it, is needed to vote competently, Section 4 explores the role of information in

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<sup>14</sup> See also Beitz (1989, xi), stating, “Although it would be naive to expect a philosophical theory, by itself, to resolve controverted questions of institutional design, an adequate theory should at least identify the central values at issue and provide a structure that informs their application.”

<sup>15</sup> Ewald in fact specifically states that “the language of cost is useful” in addressing politicized arguments about voting rules and procedures (Ewald 2012, 196).

two broadly opposing democratic theories, drawing on William Riker's seminal distinction between "liberalism" and "populism." The populist interpretation of voting, which relies on an epistemic assumption of independent standards for judging the substantive correctness of voting decisions, is shown to be associated with deliberative democratic theory and its overall skepticism about mass electoral participation due to competency concerns. As an alternative to epistemic-deliberative populism, this chapter elaborates and extends Riker's liberalism into a general theory that incorporates the value of participation within a framework of competitive democratic theory, while also allowing for the expression of deliberative values. Although weak epistemic standards are retained under this approach, mass democratic competence is shown to be viable through a more procedural epistemology of voting decisions based on perceptions of political character and leadership, and through choices of representation based on value congruence that entail lower information costs. This provides the normative foundation for analyzing particular impositions of substantive voting costs in Section 5, which discusses some institutional implications of the opposing theories in three areas: constitutional design, election law doctrine, and electoral policy reform. The approach in this work lends support to legal arguments for stricter standards of judicial review in cases alleging individual rights-based claims of vote denial, as well as supporting policy reform proposals that aim to minimize substantive voting costs. The broad standard of electoral competence articulated here thus frames the relationship between information costs and substantive costs in a way more consistent with efforts to realize an inclusive vision of mass participation in elections.

## 2) SUBSTANTIVE VOTING COSTS

As indicated previously, the substantive costs of voting in American elections vary widely. At the lower end, the act of voting might entail simply spending some free time in the evening completing a ballot that was delivered by mail to the voter's home, and then returning the ballot by mail—at the cost of a postage stamp—or otherwise delivering the ballot to election officials in a timely matter. At the other extreme, voting could conceivably involve the following drawn-out process: first traveling to a government records office during business hours, waiting and paying a fee to obtain documentation of eligibility—such as a birth certificate, for example; then traveling, waiting, and likely paying a fee at another government office to obtain an official identification card—such as a driver's license, possibly registering to vote during that process, but if not making sure to register as required, which could involve more travel; then traveling to the polls during opening hours and perhaps waiting in line—conceivably for a long time—until finally reaching the point of completing and casting a ballot.

On average, the sum of substantive costs should generally fall somewhere between these two extremes, presumably closer to the lower end for most prospective voters, but the examples illustrate some of the sources of potential variation. As indicated, the distribution of voting costs is a function of a combination of factors: First are the institutional differences in election law and administration in different states and localities, a consequence of the hyper-decentralization of control over American elections. In some states all registered voters can vote absentee without ever having to appear at a polling place, or they may vote early in person, while in other states voters have no choice but to appear on Election Day in order to cast a ballot.<sup>16</sup> In some states

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<sup>16</sup> As of the 2016 elections, no-excuse absentee balloting (by request), along with options for early voting, was permitted in 27 states and the District of Columbia, while 7 states allowed early voting but required a

voters must register separately in advance of voting, while in others they may register and vote simultaneously.<sup>17</sup> Some states require voters to provide an official identification document before voting, while others allow simply a signature or other attestation of identity.<sup>18</sup> There is also the matter of the scheduling of elections: Substantive costs for voting in local elections are largely determined by whether they are administered together with races for higher office, just as the costs for voting in state elections are strongly affected by whether they are scheduled together with federal races or held separately in odd calendar years.<sup>19</sup> When local and state elections are consolidated with higher races it yields “economies of scale” (Aldrich 1993, 261) that reduce the substantive costs of voting in down-ballot races essentially to zero—apart from any added time needed to mark the ballot, while holding these elections separately greatly increases costs by imposing a wholly separate calculus on prospective voters.

Another source of variation in substantive costs results from the interaction of electoral rules with individual situations and circumstances. Thus, only a prospective

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valid excuse for voting absentee. Oregon, Washington, and Colorado use all-mail voting, or vote-by-mail (VBM), in which registered voters automatically receive absentee ballots for all elections. There were 13 states allowing neither early voting nor absentee balloting without excuse. See NCSL (2016a).

<sup>17</sup> As of 2016, “same-day” registration (SDR), including Election Day registration (EDR), was provided in 11 states and in the District of Columbia, while 3 more states had enacted SDR but not yet implemented it. The state of Maryland permitted SDR during the early voting period, but not EDR, while Ohio allowed for 5 days of SDR at the beginning of the 35-day early voting period. See NCSL (2016b).

<sup>18</sup> There were 17 states and D.C. with no documentary identification requirements for voting in 2016. At the opposite extreme, 11 states enforced “strict” voter ID laws that required individuals without specified forms of ID to vote by provisional ballot and to provide an acceptable document within a few days after the election in order to have their votes counted. The remaining 22 states enforced “non-strict” identification requirements with provisions for allowing individuals lacking proper ID to have their votes counted with no additional action required. See NCSL (2016c).

<sup>19</sup> Data on the scheduling of local elections are somewhat scarce, but Anzia reports that about 80 percent of municipal elections in the U.S. are held separately from even-year general elections in November (Anzia 2012a, 24). According to Berry and Gersen (2010, 38), “The timing of local government elections can only be described as chaotic.” The scheduling of state elections is easier to assess, with 34 states holding regular gubernatorial elections together with off-year congressional races, while 11 states hold them in presidential election years (including Vermont and New Hampshire, which hold gubernatorial elections biennially). Kentucky, Louisiana, Mississippi, New Jersey, and Virginia hold gubernatorial elections in odd years. See generally state election data by Leip (2016).

voter who lacks the required official documentation will bear the costs of obtaining it where required. More generally, the time and opportunity costs of casting a ballot will vary greatly depending on how individual conditions interact with the administrative arrangement; for example, an individual's transportation resources and availability of free time interact with the location of polling places and early voting opportunities to influence the overall cost of voting (Dyck and Gimpel 2005). Individual and institutional factors may then further interact with other external factors, such as perhaps the weather (Gomez et al. 2007). Furthermore, as expressed by the framework of the voting calculus, the *C* term represents an individual assessment of perceived costs and willingness to bear them. Such highly idiosyncratic evaluations of negative utility are difficult to quantify, and this subjectivity presumably provides another significant source of variation in voting costs.

Despite all this potential variation, however, the dominant view on substantive costs appears to be that in practice they are relatively minimal for the average voter (Niemi 1976, 115; Blais 2000, 87; Dowding 2005, 446). These types of costs might therefore be seen as not representing significantly determinative factors in the voting calculus (Highton 2004, 508; Dowding 2005, 446).<sup>20</sup> Furthermore, political scientists emphasize that substantive voting costs in American elections seem clearly to have declined substantially over the past few decades (e.g. Berinsky 2005, 483; Leighley and Nagler 2014, 92). Accordingly, John Aldrich concluded back in the early 1990s that registration and voting costs were “relatively low and getting lower,” referencing the liberalization of voting laws as a result of congressional legislation and Supreme Court decisions in the 1960s and 1970s (Aldrich 1993, 261). Given further reforms under the

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<sup>20</sup> But see Aldrich (1993, 261), indicating that because voting is a “low-cost, low-benefit action... [s]mall changes in costs and benefits alter the turnout decision for many citizens.”

National Voter Registration Act of 1993 (also known as the “Motor Voter Act”),<sup>21</sup> and the more recent popularization of the various forms of convenience voting in many states, it seems reasonable to conclude that the overall process of registering and voting in U.S. elections is now easier than it has ever been in modern times (Highton 2004, 511). Substantive costs might thus be expected to have little weight in the contemporary voting calculus.

Nevertheless, Aldrich notes, “This is not to say that the costs of registration and voting are low in some absolute sense or that they are equally low for all people.... [L]aws may still be manipulated to regulate who is more and who is less likely to vote” (Aldrich 1993, 262, n. 17). There is indeed substantial evidence that differences in substantive costs affect voter turnout, both in the aggregate and at the individual level (Dowding 2005, 444-445; Harder and Krosnick 2008, 528-530; Smets and van Ham 2013, 352).<sup>22</sup> In fact, a few early studies found a significant correlation between measures of substantive costs and the propensity to vote, challenging the notion that these costs are negligible to the calculus (Sigelman and Berry 1982; Sanders 1980).<sup>23</sup> Additionally, the comparative turnout literature has demonstrated that turnout differences between the U.S. and other established democracies are predominantly explained by variation in substantive voting costs—most notably the voluntary registration regime that exists in most of the U.S. but is absent in other democracies, where voter registration is generally undertaken by the government (Burnham 1971, 337; Powell 1986; Wolfinger et al. 1990; Tokaji 2008, 503). Furthermore, at the state level within the U.S., studies have

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<sup>21</sup> 52 U.S.C. §§ 20501-20511.

<sup>22</sup> But see Blais (2006, 116), indicating that while making voting easier does generally raise turnout, which specific electoral rules to facilitate voting have significant turnout effects—as well as the size of any effects—remains unclear.

<sup>23</sup> The cost variable in Sanders’ study includes proxies for both substantive and information costs (Sanders 1980, 858-859).

consistently found that the closing date of registration is a significant factor influencing turnout, both individually and in the aggregate (Wolfinger and Rosenstone 1980, 78; Rosenstone and Hansen 1993, 208; Mitchell and Wlezien 1995, 195; Highton 2004, 512, n. 32).

More recently, focus has converged on Election Day registration or same-day registration (EDR or SDR) as a significant factor in turnout differences between U.S. states (Brians and Grofman 2001; Fitzgerald 2005, 856; Larocca and Klemanski 2011; Burden et al. 2014; Leighley and Nagler 2014, 101). There is somewhat less consensus, however, regarding the effects of convenience voting reforms, including vote-by-mail (VBM), no-excuse absentee balloting, and early in-person voting, with several studies finding positive effects on turnout (Southwell and Burchett 2000; Berinsky et al. 2001; Gerber et al. 2013; Larocca and Klemanski 2011; Leighley and Nagler 2014, 115), but others finding little or no effects from these types of reforms (Fitzgerald 2005; Gronke et al. 2007, 643; Gronke and Miller 2012).<sup>24</sup> There is also an ongoing dispute about the turnout effects of strict voter identification laws, with some studies finding negative effects on turnout (Alvarez et al. 2008; Hood and Bullock 2012; Hajnal et al. 2017), while others have failed to find any statistically significant effects from these requirements (Mycoff et al. 2009; Ansolabehere 2009; Erikson and Minnite 2009, 96-97).<sup>25</sup>

Perhaps more important than aggregate or individual-level turnout effects is the question of how substantive cost allocations affect the *composition* of the electorate. This is in fact what Aldrich alludes to in mentioning the possibility of manipulating electoral laws through attempts to “regulate who is more and who is less likely to vote” (Aldrich

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<sup>24</sup> For early voting in particular, most of these studies have found a null or even a negative effect on turnout. See also Giammo and Brox (2010).

<sup>25</sup> The empirical methods of Hajnal et al. (2017) have also recently been challenged by Grimmer et al. (2017), which finds no turnout effects using the same data as Hajnal et al.

1993, 262, n. 17). The prevalence of demographic bias in the American electorate is well established (see e.g. Leighley and Nagler 1992), and some argue further that registration rules in this country have been systematically exploited to demobilize lower socioeconomic groups in pursuit of partisan political gains (Piven and Cloward 1988; 2000). However, the dominant view among political scientists is that any differences in turnout produced by variation in registration and voting procedures have little to no effect—or in some cases the opposite intended effect—on the demographic bias of the electorate. Earlier empirical studies are skeptical about the compositional effects of more lenient registration rules such as later closing dates (Wolfinger and Rosenstone 1980, 83; Mitchell and Wlezien 1995, 179). More recent research reports only minimal compositional effects from EDR (Knack and White 2000; Brians and Grofman 2001, 170; Hanmer 2009), and no significant change—or even a possible *increase*—in turnout inequality as a result of convenience voting reforms like VBM, no-excuse absentee, and early voting (Berinsky et al. 2001, 178; Karp and Banducci 2001, 190; Berinsky 2005). Nevertheless, a few studies disagree, finding some evidence that cost-reducing electoral rules—with the notable exclusion of early voting—may in fact be associated with reduced socioeconomic inequality in the electorate (Avery and Peffley 2005; Rigby and Springer 2011; Franko and Tolbert 2010).

This issue forms part of a broader debate as to whether the preferences of actual voters are fairly representative of the voting-eligible population in the U.S., a question of crucial concern at the crossroads of empirical and normative political science. If the views of non-voters are in fact fairly well represented by those who turn out to vote, there is presumably less need to worry about the implications of low turnout for the democratic system, and there would be less justification for electoral reforms aimed at reducing voting costs and increasing participation. However, if higher turnout might produce



different electoral—and ultimately political and policy—outcomes, this could potentially pose a problem for democratic legitimacy, and it would provide more support for electoral reform. Here again, the prevailing wisdom seeks to allay the normative concern and mitigate the demand for reform by demonstrating that non-voters are in fact reasonably well represented by those who vote, at least in major elections. Several studies have thus concluded that even a dramatic increase in turnout—counterfactually or prospectively—would be unlikely to yield significant changes in political outcomes, since the opinions and preferences of nonvoters appear to be substantially similar to those of voters (Wolfinger and Rosenstone 1980, 111; Bennett and Resnick 1992, 799; Gant and Lyons 1993, 199; Nagel and McNulty 1996, 793; Highton and Wolfinger 2001, 192; Sides et al. 2008). However, other studies do find evidence that non-voters differ from voters in significant ways and that electoral outcomes might indeed change under higher turnout (Martinez and Gill 2005, 1270; Hansford and Gomez 2010; Leighley and Nagler 2014, 175).<sup>26</sup> Many scholars thus continue to argue that low turnout and demographic biases in the electorate have important consequences for both politics and policy (Hill et al. 1995; Martin 2003; Avery and Peffley 2005; Griffin and Newman 2005; Franko et al. 2016).

The question of how political outcomes might differ under elections with higher and more equal turnout is exceedingly complex. For one thing, even if data show non-voters to be fairly similar on average to voters, the non-voters who would decide to

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<sup>26</sup> Notably, even the more skeptical studies do generally find evidence of differences between voters and nonvoters, but they characterize these differences as slight and insufficient to alter results except in very close elections (Wolfinger and Rosenstone 1980, 111; Bennett and Resnick 1992, 799; Highton and Wolfinger 2001, 185; Sides et al. 2008, 523). Moreover, almost all of these studies examine presidential elections; Nagel and McNulty analyze senatorial and gubernatorial races, and they do find evidence of turnout effects in non-presidential years (Nagel and McNulty 1996, 785). Similarly, Citrin et al. find in senatorial elections that “there are indeed meaningful differences in the partisan leanings of voters and nonvoters,” emphasizing that their result at least partially “departs from...previous scholarship maintaining that universal turnout would make no political difference” (Citrin et al. 2003, 88).

participate under higher turnout might not necessarily represent non-voters on average (Grofman et al. 1999, 371). More fundamentally, the overall political context could be altered significantly if politicians and parties changed their campaign strategies in response to new patterns of turnout (Lijphart 1997, 4). Attempting to extend the causal chain from elections through to policy outputs presents additional analytical challenges. Furthermore, even if the prevailing wisdom proved correct about turnout effects in major elections, scheduling state or local elections separately, which results in greatly reduced turnout, makes it more likely that the preferences of non-voters might differ significantly from the preferences of the electorate (Hajnal and Lewis 2003, 661; Hajnal and Trounstein 2005, 517; Streb 2011, 13; Sides et al. 2008, 536). There is therefore more reason to worry that extremely low turnout in separately scheduled “second-order” elections may have critical consequences for politics and policy (Anzia 2012).<sup>27</sup>

The timing of second-order elections—which, as indicated previously, is an important factor in the allocation of substantive voting costs—represents another key element of institutional design having both empirical and normative implications (see Dunne 1997; Wood 2002, 228; Meredith 2009; Anzia 2014, 3-4). One might thus generally ask, are there good reasons for instituting voting rules and procedures that elicit different turnout levels in elections at different levels of government? This directly implicates the larger question of whether substantive costs should ever be used to regulate the *quality* of the electorate. Perhaps the scheduling of local elections separate from higher-order races might seem reasonable even to those who reject the imposition of

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<sup>27</sup> But see Berry and Gersen (2011, 129), failing to find significant policy effects from timing of school board elections in California, and indicating that these findings “support the conventional view that outcomes would not change importantly if everyone voted.” Elsewhere, however, these same authors express a somewhat different view, stating, “Off-cycle elections generate systematically lower turnout[,] and shifts in electoral timing produce identifiable shifts in voter participation and ultimately changes in public policy” (Berry & Gersen 2010, 55).

administrative burdens for the ostensible purpose of increasing voter competence. Indeed, one of the main reasons cited by state and local officials against consolidating their elections with federal races is that “only those citizens who care enough to inform themselves will vote” in these elections (Streb 2011, 15).<sup>28</sup>

In sum, as a policy matter, and as a matter of legal theory and doctrine, how substantively easy or hard should it be to cast a ballot? Should the logistics of voting be set up in such a way as to encourage participation, discourage it, or perhaps somehow treat it neutrally? As should be clear by now, the relationship between substantive voting costs and voter turnout raises crucial issues for both empirical political science and for political theory. As indicated, however, while there has been abundant research into the practical effects of electoral institutions, there has been far less examination of their normative foundations. Moreover, even empirical political scientists may acknowledge that the notion that “turnout matters” should not necessarily depend on evidence of institutional effects on political outcomes (Leighley and Nagler 2014, 156).<sup>29</sup> Much of the empirical literature thus seems implicitly to assume that higher and more demographically equal turnout is normatively preferable. This assumption may be justified by participatory democratic theory, but it does require justification, and other schools of democratic thought may in fact challenge that premise—a challenge that must

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<sup>28</sup> Streb himself concludes that “while in a democracy the quality of a person’s vote is always a concern, separating state and local elections from federal elections is not a guarantee of smart voting; and it is not a reason to purposely lessen voter turnout” (Streb 2011, 15). See also Ortiz (2004, 221), discussing—though ultimately rejecting—the argument that raising voting costs by holding local elections separately ensures more competent voting. But see Orr (2013, 426), discussing the “deliberative benefit” of scheduling elections separately for different levels of government. It is worth noting that separate scheduling of local elections was originally a Progressive Era reform, among other reforms made in the name of “good government” in the early 20<sup>th</sup> century (see Anzia 2012a, 24; Bernstein 2014).

<sup>29</sup> According to Leighley & Nagler (2014, 156), “The substantive conclusion that it does not matter who votes seems especially inconsistent with our basic beliefs about how representative politics work.”

be answered. To begin doing so, the focus now shifts from the substantive costs of voting to the costs of information.

### 3) INFORMATION COSTS

As indicated previously, the information costs of voting are the evaluative and decisional burdens associated with examining the options on the ballot and choosing how to vote. Any discussion of information costs generally begins with the well-known theory of rational ignorance, which Downs first formulated as follows:

[I]t is irrational for most citizens to acquire political information for purposes of voting.... The probability that [one's] vote will determine which party governs is so low that even a trivial cost of procuring information outweighs its return. Hence ignorance of politics is...a highly rational response to the facts of political life in a large democracy (Downs 1957b, 147).

The theory of rational ignorance thus emerged from the problem associated with a purportedly minuscule value of  $p$  in the voting calculus—the so-called “paradox of nonvoting,” which is grounded in the assumption that an individual vote matters to an election outcome only to the extent that it might be *pivotal* to breaking (or making) a tie—a vanishingly small probability in even the most competitive of large elections (Owen and Grofman 1984). According to Downs, this results in a collective action problem that deters acquisition of the information needed for the public good of democracy, because “it is rational for every individual to minimize [the] investment in political information, in spite of the fact that most citizens might benefit substantially if the whole electorate were well informed” (Downs 1957b, 148).

This application of the pivotal vote problem to information costs is often cited as a critical weakness of mass participatory democracy. Russell Hardin, for example, indicates that while many people seem to overcome the pivotal vote problem with respect to participating, “the problem of investing in enough knowledge to vote intelligently may well be the more fundamentally serious issue in democratic theory” (Hardin 2002, 225).<sup>30</sup> Public choice scholarship in particular has seized on the pivotal vote problem as a major obstacle to rationally informed decision-making in politics. Brennan and Buchanan have famously argued that if individual votes in large elections have no instrumentally efficacy, there is no logical connection between electoral choices and voter preferences over outcomes, which provides “widespread scope for electoral irrationality of the most basic kind” (Brennan and Buchanan 1984, 199). Ilya Somin extends this argument by applying rational ignorance even to altruistic voters with idealistic motives, concluding that the lack of incentive to become well informed “stands as a particularly imposing obstacle to effective democratic control of government” (Somin 1998, 436). Bryan Caplan appears to take rational ignorance to its logical conclusion in his account of “rational irrationality,” which asserts that since individual votes have no instrumental efficacy, it is actually rational to vote based on any beliefs that are psychologically satisfying, even if such beliefs happen to be based on clear factual errors (Caplan 2007, 123-126). Notably, however, these concerns about the quality of electoral participation are not exclusive to scholars in the public choice tradition of economic approaches to politics (see Hauptman 2001). James Fishkin, for example, also relies on pivotal theory and rational ignorance in his criticism of mass electoral democracy for its failure to meet deeper deliberative ideals (Fishkin 2009). As a result of the Downsian collective action

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<sup>30</sup> Hardin traces the modern treatment of the information problems of mass democracy not only to Downs, but also to Schumpeter (Hardin 2002, 217). See also Somin (2006, 256-257), indicating that rational ignorance “poses a major challenge to normative theories of democratic participation.”

problem associated with acquiring political information, Fishkin concludes that “if we include everyone, it seems that we are unlikely to get a thoughtful public input from our democratic institutions” (7).<sup>31</sup>

Chapter 1 of this dissertation argued for rejecting pivotal theory and resolving the apparent paradox of instrumentally motivated turnout through an alternate interpretation of the causal efficacy of individual votes—an interpretation that allows the probability of an individual vote contributing to an election outcome to be quite high, at least in competitive elections. This argument, if accepted, fundamentally undermines the conventional theory of rational ignorance, which as indicated, is founded upon the existence of the pivotal voting problem.<sup>32</sup> However, even if ignorance about politics were no longer considered perfectly rational in theory, empirical evidence of ignorance about politics might continue to pose a serious normative problem. Accordingly, the deeper difficulty for democratic theory, as Jeffrey Friedman suggests, is not that political ignorance is rational, but simply that it is prevalent—and not as a result of calculated decisions to remain under-informed about politics, but more likely as a direct result of the profound complexity of modern government (Friedman 1998, 407-409; 2013b).

The literature describing the political knowledge of average Americans is vast and enduring, and the evidence of informational deficiencies appears overwhelming at first glance (e.g. Berelson 1952; Converse 2006 [1964]; Luskin 1987; Delli Karpini and Keeter 1996; Somin 2004). There are generally two schools of thought, however, in

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<sup>31</sup> Fishkin also apparently agrees with Somin that rational ignorance is a problem even if voters have altruistic motives, stating, “This problem—that there is little rational motivation for citizens to deliberate about public issues in mass democracies—does not depend on citizens being selfish or merely self-interested” (Fishkin 2009, 49).

<sup>32</sup> At the very least, a rejection of pivotal voting theory limits the application of rational ignorance to situations where the cost of acquiring information outweighs other elements of the calculus, such as where the  $pB$  term is valued at zero because an election is perceived to be uncompetitive and/or because the expected benefit differential between candidates is negligible.

interpreting the implications of this evidence for democratic theory: The first approach argues that democracy can succeed notwithstanding these apparent deficits of information, either because individuals supplement their low levels of knowledge using various forms of cues or heuristics (Brady and Sniderman 1985; Popkin 1991; Lupia and McCubbins 1998; Druckman 2001; Marietta and Baker 2007), or because some form of collective rationality or aggregate efficiency can emerge despite informational deficiencies at the individual level (Feld and Grofman 1988; Page and Shapiro 1992; Wittman 1995; Landemore 2013). The second school of thought takes the abundant evidence of shortcomings in political knowledge as a more critical concern for the functioning of democracy, and resists the notion that information shortcuts or any “miracle of aggregation” could eliminate the problem of missing—or mistaken—information (Bennett 1996; Kuklinski et al. 2000; Somin 2006; Caplan 2007). Thus, while the first approach essentially concludes that the information costs of mass democracy are not effectively that high, the alternative view holds that these costs are in fact quite substantial, and likely prohibitive in many cases.

The conclusions of the more pessimistic school are bolstered by evidence of “information effects” in survey responses, suggesting that significant deficits in political knowledge have practical consequences for public opinion and voting decisions, and ultimately on public policy outcomes (Delli Karpini and Keeter 1996, 219; Bartels 1996; Gilens 2001; Althaus 2003; Arnold 2012).<sup>33</sup> On the other hand, research in political

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<sup>33</sup> These studies generally simulate an objective standard of fully informed opinion—or so-called “enlightened preferences”—by imputing the surveyed opinion of highly informed individuals to demographically similar individuals with less information. Note that the simulation of enlightened preferences may be subject to criticism on methodological grounds, as Althaus himself cautions against overconfidence in its results, stating, “The simulation assumes that the opinions of the relatively more knowledgeable... indicate the ‘correct’ views, against which all other opinions of similar people should be judged. It is easy to see where this assumption might prove untenable” (Althaus 2003, 141). Along these lines, Lau and Redlawsk (1997) evaluate vote choice by a more subjective individual standard, and they find about a 75 percent rate of “correct” voting in presidential elections.

psychology may provide reasons for doubting the pessimistic view. A fundamental challenge comes from the psychological concept of *ambivalence*, which was discussed in Chapter 2. If individuals may sometimes simultaneously hold conflicting opinions, this state of uncertainty could appear as an absence of clear preferences or “true attitudes” on political issues, which would result in survey response patterns that seem to indicate lack of knowledge, but that in fact reflect merely ambivalence (see Zaller and Feldman 1992; Lavine 2001). In contrast to the pejorative overtones of choices labeled “incorrect” or “uninformed,” the concept of ambivalence is more nuanced and less normatively charged, reflecting the realistic challenge of “reconciling strongly held but conflicting principles and considerations simultaneously present in the political culture” (Lavine 2001, 915).<sup>34</sup> Similarly, the psychological model of “on-line” information processing (Lodge et al. 1995), in which individuals maintain a running tally of cognitive assessments, suggests that inability to recall factual information in response to survey questions does not necessarily imply the incapacity for informed choice or responsive political judgment.<sup>35</sup> These psychological constructs may raise their own normative problems, but they are not problems of low knowledge resulting from high costs of information; they are instead problems that arise in information-rich environments as well.<sup>36</sup>

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<sup>34</sup> Notably, even the “voting correctly” approach of Lau and Redlawsk (1997) remains susceptible to the problems raised by the possibility of ambivalence.

<sup>35</sup> There are also other methodological objections to the measurement of information effects through analysis of survey responses, which may underestimate the quality of actual knowledge (see e.g. Achen 1975; Mondak and Davis 2001; Prior and Lupia 2008; Levendusky 2011); but see Luskin and Bullock (2011), responding to some of these objections.

<sup>36</sup> In fact, in formal analytical terms, increased access to political information will not always yield improved vote choice, as additional information could reduce the perceived benefit differential between ballot options, thereby making choice less efficient (Tollison and Willett 1973, 63); see also Prato and Wolton (2016).



Overall, these arguments about information and its effects can be framed as fundamental debates about electoral competence and the role of voters in a mass democracy, as reflected in these conflicting interpretations of the implications of political knowledge levels for democratic functioning. As with substantive costs, the real and perceived costs of information may exhibit significant variation, but there is a more basic measurement problem caused by an underlying normative uncertainty about what the informational costs of voting actually entail: What kind of information—and how much of it—is necessary in order to cast a “well-informed” vote? Is there an independent standard by which to judge the quality of a voting decision and to assess whether it is sufficiently reasonable or well enough informed? To address these questions, the essential elements of democratic competence—which the political knowledge and information effects literatures often seem to take for granted—must be defined with greater clarity.<sup>37</sup> This requires a deeper investigation into underlying interpretations of the meaning of voting in democratic information theory.

#### **4) INFORMATION THEORY FOR REPRESENTATIVE DEMOCRACY**

Near the dawn of the modern-day empirical findings of sizable political information deficits among the American public, E. E. Schattschneider stated, “The significance of this widespread ignorance about public affairs depends largely on what we think democracy is” (Schattschneider 1960, 135). Likewise, conceptions of democracy are inextricably tied to characterizations of the information costs of voting, since the amount and type of information needed to make competent voting decisions

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<sup>37</sup> There are some who oppose use of the normative concept of democratic competence, arguing that it is either too elitist or too vague to be theoretically useful (Smiley 1999; Weissberg 2001; Lupia 2006). Others, however, assert that the concept of competence may be useful for institutional design, particularly if it is defined explicitly (Elkin 1999; Kuklinski and Quirk 2001).

depends on basic interpretations of the meaning and purpose of democracy (Kelly 2012, 61). It is therefore important to begin by observing that in contemporary democratic theory and practice, and particularly in the American democratic tradition, the primary institutional focus is on *representative*, not direct, democratic forms (see e.g. Levinson 2012, 76; Serota and Leib 2013, 1599).<sup>38</sup> Representative democracy may in fact be the archetypal institutional response to the perceived problem of mass democratic competence. When James Madison advocated for an American *republic*—by which he specifically meant, “a government in which the scheme of representation takes place,” his famously stated purpose was “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens” (Madison 2001 [1787], 46). Madison thus believed that the body of elected representatives would tend to make decisions “that are more consonant to the public good than if pronounced by the people themselves” (id.). This of course does not mean that elected representatives will always make decisions that are fully consonant with the public good, as Madison readily admitted (47), but the ideal model is one that aims at improving democratic competence through this institutional “scheme.”

Nevertheless, there may be reasons to doubt whether the masses can ever acquire sufficient information to achieve democratic competence even under an ideal representative democracy. There are of course many different ways of understanding the meaning and function of political representation (Pitkin 1967; Mansbridge 2003), and these distinctive understandings may entail different standards of knowledge requirements for democratic competence (Disch 2011). According to Ilya Somin, voters

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<sup>38</sup> A discussion of the information costs of direct democracy is beyond the scope of this chapter, but it may generally be seen to have higher informational requirements, so that if voters are seen as incompetent for electing representatives, they could *a fortiori* be presumed incompetent for direct democracy (Burnett & McCubbins 2013, 1558).

are generally incompetent for representative democracy even under representational theories with the least demanding informational requirements (Somin 2013, 38). The theory of retrospective voting—in which voters are seen as empowered simply to decide whether to retain or replace incumbents—is the least demanding representational theory in Somin’s view; however, he argues that considerable political knowledge is required to competently judge the performance of elected officials—including, he says, at least a basic understanding of the formation of public policy, and the ability to accurately evaluate particular policy implementations (40-41). Likewise, Somin contends that the second least demanding theory—Burkean trusteeship—requires voters to have basic knowledge of the functions of particular government offices and the qualifications of candidates for those positions (43-44).<sup>39</sup> In a similar vein, Russell Hardin discusses the high informational demands of effective representation, stating, “If we wish to assess the morality of elected officials, we must understand their function as our representatives and then infer how they can fulfill this function” (Hardin 2004, 76). For informational skeptics like Somin and Hardin, doubts about democratic competence are not allayed by the Madisonian scheme of representation. Arguably, this is because they subscribe—in the tradition not of Madison, but rather Rousseau—to what William Riker calls the

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<sup>39</sup> Although Somin’s ordering of representational theories has Burkean trusteeship with greater knowledge requirements than retrospective voting (38), the level of policy understanding he indicates is necessary for competent retrospective voting arguably seems more demanding than the requirements of trusteeship theory, which he indicates is “concerned more with the personal qualities of political leaders than with their policies or issue positions” (44). Furthermore, Somin writes in a footnote that “few modern theorists fully subscribe to the Burkean trusteeship model,” citing Pitkin on the problematic assumption that representatives can determine the “‘true’ interests” of their constituents in an “‘objective’ and unbiased manner.” (213, n. 26) Pitkin indeed criticizes Burke’s model of representation for assuming that “political questions have right answers that can be found” through a process of “rational deliberation,” as Pitkin states that for most modern theorists, “political questions are inevitably controversial ones without a right answer” (Pitkin 1967, 189). However, Somin’s indication that trusteeship theory is concerned with the personal qualities of political leaders seems to challenge that characterization, and moreover, the assumption that right answers to political questions might be found by rational deliberation seems to be one that theorists like Somin would share, as discussed below.

*populist* interpretation of democratic voting; namely, that the popular will of the people should be embodied in its political representatives (Riker 1982, 11).

### **a) Riker's Populism and Epistemic Democratic Theory**

According to Riker, it is only under the populist interpretation of voting—which subscribes to an ideal of representation in accordance with an identifiable popular will—that there is an objective standard for judging the quality or correctness of electoral outcomes (Riker 1982, 11). In contrast, under what Riker terms the *liberal* interpretation of voting, he states that “it is not assumed that the electorate is right,” nor is there any basic assumption of “popular competence” (10). In place of voting outcomes expressing the popular will, Riker’s liberalism requires only that “the electorate can change officials if many people are dissatisfied or hope for better performance” (11).<sup>40</sup> For populism to function, there is a need for a reliable mechanism to aggregate individual preferences into an expression of the popular will; however, Riker’s essential assertion is that no voting system is able to perform this aggregation function fairly and accurately, and he thus

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<sup>40</sup> Schattschneider employs an apparently similar distinction, contrasting what he calls the classical ideal of “government by the people” with democracy defined as “a political system in which the people have a choice among alternatives created by competing political organizations and leaders” (Schattschneider 1960, 141). For an updated version of this theoretical dichotomy, see (Beerbohm 2012, 27-28), describing competing conceptions of democracy as “self-rule” versus “answerable rule.” Bruce Cain’s distinction between populist and pluralist democratic design strategies may also be seen as generally tracking this conceptual distinction, particularly with regard to his understanding of the goal of populism as “perfect representation of individual preference” (Cain 2015, 200). Achen and Bartels also distinguish between populist democratic theories and models based on “leadership selection,” but they conclude—along with Somin and Hardin as discussed above—that empirical research casts doubt on the prospects of individual-level competence even just for choosing leaders (Achen and Bartels 2016, 2-4). Instead, Achen and Bartels advocate for democratic theory based in what they consider more “realist” conceptions of group identity (311-313). Riker’s dichotomy might also be seen as corresponding somewhat with the classical liberal versus civic republican paradigm, to the extent that republicanism may be viewed as supporting the existence of a “substantive common interest or good,” while “liberal pluralism” is associated with the denial of any objectively identifiable common interest (Michelman 1989, 445). However, Michelman’s more nuanced framework of conceptions of democracy in constitutional discourse shows that the traditional republican versus liberal dichotomy does not necessarily track other dimensions of normative distinctions (450-452). Riker’s liberalism should therefore not be equated with liberalism more generally, nor his populism with civic republicanism.

argues that populism must be rejected, “simply because we do not and cannot know what the people want” (Riker 1982, 238).<sup>41</sup> The more important point for present purposes, however, is that rejecting populism also has the effect of alleviating concerns about democratic competence that arise from apparent deficits of political information. Riker actually goes as far as arguing that even ostensibly random decision-making by voters “does not really matter for the liberal hope of preventing an official’s abuse of office and authority” (243).<sup>42</sup> What remains therefore is clearly a very minimal vision of democracy, as Riker readily admits: “The kind of democracy that thus survives is not, however, popular rule, but an intermittent, sometimes random, even perverse, popular veto” (244).

This limited conception of the meaning and purpose of democracy, which clearly echoes the minimalist theory of Joseph Schumpeter (2003 [1942]), has been considered unsatisfactory to many—if not most—democratic theorists. As Coleman and Ferejohn have argued in response to Riker, if conclusions about the meaninglessness of voting outcomes were taken to their logical extreme—if the removal of officials were really random—it would in fact seem to threaten the foundations even of Riker’s minimalist liberal democracy (Coleman and Ferejohn 1986, 22).<sup>43</sup> A purely random decision method—such as rule by coin toss—might be a *fair* way of making decisions, but it would not be a *democratic* procedure, which presumably aims at better than random

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<sup>41</sup> Riker’s overall argument employs the voting paradox associated with Arrow’s theorem (not to be confused with the paradox of “nonvoting” associated with pivotal theory), along with the existence of other opportunities for manipulating the conditions of social choice, to conclude that “the outcomes of voting are not necessarily fair and true amalgamations of voters’ values,” and that in fact “these outcomes may be meaningless” (Riker 1982, 233).

<sup>42</sup> “Indeed,” states Riker, “an official who faces an electorate knowing that it sometimes works randomly and may ‘unfairly’ reject him or her has a powerful motive to try even harder to avoid offending voters” (243).

<sup>43</sup> More substantively, Coleman & Ferejohn challenge Riker’s conclusion that voting outcome are meaningless, and they argue that formal problems such as cycles and agenda-based control are in practice less common and pervasive than Riker assumes (Coleman and Ferejohn 1986, 15, 23-24). See also Grofman (1993, 1545-1546).

outcomes (Estlund 2008, 6).<sup>44</sup> Coleman and Ferejohn thus argue that democratic legitimacy cannot be purely procedural—there is a need for some substantive content or instrumental purposes in order for democratic decision-making to have any real normative meaning (Coleman and Ferejohn 1986, 22).

Accordingly, Coleman and Ferejohn defend populism from Riker’s challenge by proposing the possibility of an “*epistemic*” theory of democracy, in which voting is seen as “consisting in *judgments*—which can be either true or false—rather than in expressions of preferences—which are neither” (Coleman and Ferejohn 1986, 15-16). Joshua Cohen elaborates this epistemic interpretation of voting, stating that it consists of three basic elements: 1) “an *independent standard* of correct decisions”; 2) “a *cognitive account* of voting,” in which individuals vote in accordance with beliefs about the given standard of correctness; and 3) “an account of *decision-making* as a process of the adjustment of beliefs...in light of evidence about the correct answer that is provided by the beliefs of others” (Cohen 1986, 34). Cohen thus concludes, “What the epistemic populist claims is that, when there is a general will, and public deliberation is guided by the principles that define that will, the decisions of majorities about which policies to pursue can provide good evidence about which policies are in fact best” (id.).

Pessimists about the prospects for democratic competence due to informational problems can be seen as generally committed to this epistemic interpretation of voting, which assumes the existence of correct—or at least better and worse—answers to political questions. These theorists therefore tend to reject “normative skepticism” and instead presume the existence of “independent standards against which we must evaluate

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<sup>44</sup> Note that pessimists about democratic competence worry that voting decisions may be *worse* than random, since they may be biased toward irrational and clearly incorrect views (see Caplan 2007, 2).

the correctness of our judgments” (Kelly 2012, 36).<sup>45</sup> Moreover, epistemic assumptions may extend to democratic optimists as well. Hélène Landemore, whose work is generally more confident about the prospects for democratic competence, retains an epistemic assumption affirming that “at least for some political questions there are right or correct answers” (Landemore 2013, 208).<sup>46</sup> The roots of this epistemic assumption can likewise be seen in more optimistic analyses of democratic competence appealing to the Condorcet jury theorem, which requires as a basic premise the existence of an objectively correct answer to whatever question is put to a vote (Grofman and Feld 1988, 569).<sup>47</sup>

This confidence of epistemic approaches to democracy in the existence of more or less correct answers to political questions—of essentially true or false political ideas—leads to institutional approaches that emphasize informational issues, which fall generally under the umbrella of deliberative democratic theory.<sup>48</sup> James Fishkin’s work typifies this approach, distinguishing between institutions designed to express “raw” public opinion formed under “debilitated conditions,” and institutions that facilitate a more “refined” expression of “deliberative public opinion” (Fishkin 2009, 13-14). Similarly, Cohen’s ideal deliberative procedure distinguishes between the institutional implications of voting

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<sup>45</sup> In fairness, Kelly indicates only that independent standards for judging the correctness of decisions must exist “at least some of the time” (Kelly 2012, 36). Similarly, Coleman and Ferejohn state, “The epistemic populist begins by distinguishing between those electoral issues in which there exists a general will and those in which there is no reason to believe that there is a general will or disposition” (Coleman and Ferejohn 1986, 16).

<sup>46</sup> Landemore’s approach—which she terms “political cognitivism”—is particularly flexible in allowing for weaker and stronger epistemic approaches (213), and even for the possibility of an epistemic theory in which the standard of correctness is “socially and culturally determined” (217).

<sup>47</sup> The Condorcet jury theorem ensures that a majority voting decision of a large group will almost always reflect the “correct” answer to a binary question, assuming that voters have at least a 50 percent chance of identifying the correct answer, and each voter decides independently—and votes sincerely (Grofman and Feld 1988, 569-570). See also Landemore (2013, 71).

<sup>48</sup> The epistemic deliberative democracy discussed here may be distinguished from what Kelly calls “deep deliberative democracy,” a purely procedural theory holding that the process of deliberation is intrinsically valuable, independent of its effects on outcomes (Kelly 2012, 48). Kelly concludes that deep deliberative theory is fundamentally untenable since it deprives democracy of any substantive content (80).

under conditions of a commitment to providing “reasons persuasive to all,” and voting viewed as the aggregation “of non-deliberative preferences” (Cohen 1989, 23). Landemore’s deliberative theory, perhaps somewhat more flexibly, focuses on the epistemic appeal of inclusiveness and cognitive diversity, arguing that “deliberation among inclusive groups is likely to produce better results” (Landemore 2013, 90).<sup>49</sup>

A potential problem with epistemic approaches in deliberative democratic theory, however, is that they generally fail to provide much support for broadly participatory institutions. This is perhaps most explicit in Fishkin’s “trilemma of democratic reform,” which describes three primary values that modern democratic institutions aim to express: 1) political equality, 2) deliberation, and 3) mass participation (Fishkin 2009, 32).<sup>50</sup> The “trilemma” arises because according to Fishkin it is impossible to simultaneously satisfy all three democratic values.<sup>51</sup> The primary emphasis is on the apparent conflict between participatory and deliberative values—and more specifically, on the defects of what Fishkin terms “raw” public opinion under conditions of mass participation that lack adequate procedures for deliberation (47-52). While acknowledging the historical trajectory of democratic institutional development in the direction of expanding and equalizing the suffrage, Fishkin nevertheless laments how “opening up political processes

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<sup>49</sup> Kelly is apparently somewhat more skeptical about the epistemic properties of deliberation, indicating that epistemic theories of deliberative democracy may be subject to challenges based on “framing effects and other cognitive pathologies” (Kelly 2012, 89). Much of the criticism of deliberative theory in fact emerges from an epistemic perspective, offering both empirical and theoretical arguments that deliberation fails to deliver on its promises of finding right answers (Thompson 2008, 498-499; Pennington 2010; Somin 2010).

<sup>50</sup> Fishkin later adds a fourth value, non-tyranny—which is concerned with limitations on majority rule and is said to apply not to the democratic process itself but to the outcome of that process (60).

<sup>51</sup> See also Ortiz (2004, 211), indicating that conflict between the value of “thoughtful” choice and the values of broad and equal participation is the “paradox of mass democracy.”



to facilitate mass participation has had the unexpected effect of lessening the realization of...deliberation” (48).<sup>52</sup>

It is easy to see why epistemic theorists are tentative about endorsing mass participation in elections, as there is indeed a certain contradiction in insisting that democracy should have strong epistemic properties, while at the same time endorsing participation by what appear to be severely uninformed and perhaps even irrational citizens. An extreme demonstration of this tension is evident in the work of Jason Brennan, who argues earnestly in favor of replacing universal suffrage with “a moderate epistocracy, in which suffrage is restricted to citizens of sufficient political competence” (Brennan 2011b, 700). Brennan’s proposal for restricted suffrage presumably falls beyond the pale of contemporary democratic norms, but in fact it seems to follow logically from the core assumption in epistemic theory of an independent standard of correctness. As Coleman and Ferejohn suggest in their account of epistemic theory, “The desirability of a voting rule will...depend on its reliability—the extent to which the collective judgments it generates converge with what is in fact the correct judgment” (Coleman and Ferejohn 1986, 16-17).<sup>53</sup> A certain ambivalence about mass participation is likewise detectable even in less extreme proponents of epistemic theory. David Estlund, for example, indicates that rule by the knowledgeable few could in principle confer more normative legitimacy than mass electoral participation, but he indicates that such an epistocracy should be rejected for procedural reasons arising from the inability to agree on “a justification that could be accepted by all qualified points of view” (Estlund 2008,

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<sup>52</sup> This is not to say that Fishkin advocates a return to reduced or restricted suffrage; rather, he aims to fill the epistemic gap in democratic institutions by incorporating more opportunities for deliberation (25-31). See also Ackerman and Fishkin (2004), advocating for a national holiday to facilitate deliberation prior to elections.

<sup>53</sup> Coleman & Ferejohn admit there are conceptual difficulties in identifying the reliability of any voting rule, but they argue that voting can still retain epistemic properties (17).

33). Landemore, on the other hand, provides substantive reasons against epistocracy (Landemore 2013, 52), but in order to ensure cognitively diverse deliberation she advocates a system of sortition in place of mass electoral participation, concluding that “random selection is preferable to elections as a selection mechanism for representatives” (117).

There is thus a real conflict between epistemically-based conceptions of deliberative democracy and contemporary notions of mass electoral participation. Without seriously entertaining arguments for suffrage restrictions, epistemic democratic theory could nevertheless make a reasonable case for higher substantive voting costs, and it might likewise offer general normative legitimation of lower turnout elections (see Rosema 2007).<sup>54</sup> The question then for participatory theorists is whether there can be a coherent alternative to epistemic theory: Is there any interpretation of voting capable of supporting the ideal of mass electoral participation without sacrificing democratic meaning? Epistemic theorists have proceeded as if it were self-evident that any non-epistemic interpretation of voting would be overly minimalist and therefore insupportable. Might there, however, be a meaningful theory of democracy that is able to avoid strong epistemic interpretations of voting? Is it possible to justify the notion that there are no right or wrong answers to voting decisions without drifting into pure proceduralism? Can institutions of broad electoral participation be embraced without completely sacrificing the democratic value of deliberation? In other words, might there be a solution to Fishkin’s trilemma?

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<sup>54</sup> According to Rosema, low turnout may be a “blessing in disguise,” since those who do participate are likely to be more politically sophisticated and make “better” choices (612).

## **b) A Non-Minimalist Alternative to Epistemic Theory**

Fishkin begins by asserting that there is no one unified conception of democratic theory, rather there are several competing theoretical approaches to understanding democracy. He thus divides prevailing theories into four categories of ideal types, labeled: 1) competitive democracy, 2) elite deliberation, 3) participatory democracy, and 4) deliberative democracy. According to Fishkin, the trilemma arises because none of these theories can simultaneously satisfy all the democratic values of participation, equality, deliberation, and non-tyranny (Fishkin 2009, 65-66).<sup>55</sup> If, however, there *were* a way to incorporate all of these values in democratic institutional design, this would not only resolve the purported trilemma, but it could also form the basis for a more comprehensive unified theory that effectively combines the four prevailing approaches. In fact, Fishkin's own analysis sets out a framework for constructing a more expansive theory along these lines. In an appendix entitled, "Why We Need only Four Democratic Theories," he argues that any attempt to satisfy all the democratic values is a "utopian" pursuit destined to fail, because it ignores the "difficult trade-offs" posed by the trilemma (198). However, the competing ideal theories that Fishkin outlines can in principle be seen as broadly consistent, and all four democratic values can arguably be combined into a coherently unified theory that does not warrant the pejorative designation of minimalism.

Fishkin's review of ideal theoretical types begins with competitive democracy, which he identifies as originating in Schumpeterian minimalism (66).<sup>56</sup> The basis of competitive theory is simply that democratic elections should provide opportunities for

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<sup>55</sup> As indicated above, Fishkin adds a fourth democratic value of non-tyranny subsequent to his formulation of the "trilemma" (see *supra* n. 50).

<sup>56</sup> Fishkin also cites more recent examples of competitive theory in the work of Richard Posner and Ian Shapiro (211, n. 1).

peaceful alternation in government, and that there should be some basic constitutional restraints on government authority. Echoing Riker's rejection of populism, Fishkin states that under competitive theory, "to expect the will of the people to mean much, if anything at all, is a delusion" (67). According to Fishkin, the main democratic value that competitive theory satisfies is non-tyranny, but he states that the ideal type of this theory is best understood as integrating basic claims to equality as well. The first question in trying to outline a unified theory is thus whether competitive theory can also be interpreted in a way that integrates the value of *participation*, notwithstanding the fact that competitive theorists have been generally skeptical regarding mass participation, as Fishkin indicates (69).

Fishkin himself answers this question affirmatively, stating that a joint commitment to participation, equality, and non-tyranny "is best seen as a variant of competitive democracy that adds a concern for mass participation," which he concedes is "a reasonable alternative for anyone concerned with competitive elections" (200). In fact, Riker explains his theory of liberal democracy as based upon three principles: participation, equality, and liberty—which he states cohere together through a focus on voting as "the central act of democracy" (Riker 1982, 5).<sup>57</sup> Indeed, according to Riker, "The crucial attribute of democracy is popular participation in government" (id.). Under Riker's liberalism, whether a democratic outcome is "correct"—not epistemically, but in a sense of normative legitimacy—could thus crucially depend on high levels of participation. Under populism, as reflected in the epistemic interpretation of voting, low participation might be seen to engender a legitimate outcome if it represents an informed

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<sup>57</sup> Riker's concept of liberty, which he associates with individual freedom and autonomy (Riker 1982, 6), does not exactly track Fishkin's value of non-tyranny, although there is clearly some resemblance. Riker states that constitutional restraints against tyranny are compatible with his theory of liberalism, and in practice probably necessary to it, although not strictly definitional (248).

decision that is more likely to be correct than it would have been had more citizens participated. However, when conceiving of democracy as a competition for mass approval, or avoidance of a popular veto, outcomes produced under conditions of low participation could be seen as lacking in normative legitimacy. This would of course be particularly true if increased participation might have altered the result, but even if outcomes are not dependent on turnout levels, competitive theory might still be interpreted to require high turnout to the extent that participation is seen as *constitutive* of democratic legitimacy, as opposed to merely reflecting an instrumental constraint (see Michelman 1989, 451).<sup>58</sup>

What then remains in order to construct a more comprehensive unified theory of democracy on Fishkin's terms is only to incorporate the value of deliberation. Here it is important to note how Fishkin divides the ideal theoretical types emphasizing deliberation into two separate categories of "elite deliberation" and "deliberative democracy." According to Fishkin, elite deliberation is essentially just representative democratic theory in the Madisonian tradition, while the category of true deliberative democracy is reserved for deliberation "by the people themselves" in what appear to be more direct democratic forms (Fishkin 2009, 70-73). However, representative democracy with the value of deliberation satisfied mainly at the elite level is fully consistent with competitive theory, and it is also fully consistent with mass participation. Fishkin is critical of Madisonian theory as lacking in the value of political equality, arguing that it institutionalizes deliberation "*for* the people," but not deliberation "*by* the people," since it "does not offer each voter an equal chance of being decisive on substantive decisions" (73). However, the election of representatives surely does implicate important issues of

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<sup>58</sup> Michelman states that the constitutive—as opposed to instrumental—value of participation has generally been associated with deliberative ideals in American constitutional discourse, but he indicates that this connection is not conceptually required (Michelman 1989, 452).

participatory equality, and it thus seems wrong to criticize elite deliberation on this basis, unless one means to reject representative democratic forms in their entirety. Furthermore, if deliberation is valued for its epistemic properties, shifting this function to elected representatives should seem attractive. Of course, epistemic problems may arise at the elite level as well, but representative assemblies may—at least in principle—be able to avoid these problems by serving as what Fishkin calls “deliberative microcosms” for making informed decisions about public policy.<sup>59</sup> In other words, Fishkin has not proved why deliberation “by” the people is an absolute necessity. Deliberation “for” the people does not exclude the possibility of “government by the people,” again, unless one means to question the foundations of representative democratic theory.<sup>60</sup>

Incorporating the value of deliberation at the elite level thus allows for a coherent unified theory that comprehensively embraces all the democratic values identified by Fishkin. Nevertheless, the value of deliberation under this theory need not be isolated exclusively to the realm of elites. The existence of opportunities for deliberation by citizens at the mass level is certainly not inconsistent with a competitive/participatory approach to democratic theory, even when rejecting the epistemic assumption that voting decisions should be evaluated by an independent standard of correctness. The deliberative theory of Bernard Manin illustrates this well: According to Manin, the competing norms involved in political debate are not subject to an independent standard of correctness by which they can be judged either true or false; however, politics is “not reduced to pure arbitrariness because a norm can be more or less *justified*” (Manin 1987, 354). It is this

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<sup>59</sup> This obviously echoes the Madisonian ideal of representation to “refine and enlarge the public view.” It also seems closer to the Burkean understanding of trustee representation, which as noted previously, Pitkin identifies with the epistemic assumption that “political questions have right answers” (see *supra* n. 39).

<sup>60</sup> However, it may be noted that Schattschneider indicates that a literal interpretation of the ideal of “government by the people” represents a mistake in democratic theory (Schattschneider 1960, 131, 136).

process of argumentative justification taking place in the public sphere that forms the basis for Manin's version of deliberative democracy.<sup>61</sup> Manin stresses that this concept of deliberative legitimacy is consistent with the Schumpeterian understanding of democracy as a competition for political power, and with voting understood as a necessary aggregative mechanism to conclude the process of public deliberation (Manin 1987, 359-359).<sup>62</sup> Furthermore, Manin's also suggests the need for high levels of participation in order to legitimate democratic decision-making, stating as follows: "The deliberative principle is both individualistic and democratic. It implies that *all* participate in the deliberation, and in this sense the decision made can reasonably be considered as emanating from the people" (352).<sup>63</sup> In Manin's view, it is essentially the participation of the masses—not the correctness of its decisions—that confers normative democratic legitimacy.

This discussion still begs the question of whether the masses can indeed be viewed as competent to engage in meaningful deliberation or voting in the context of representative democratic institutions. It remains to be seen whether information costs under the theory outlined here are low enough that most—if not all—citizens should be willing and able to pay them. In order to respond to skeptics about democratic

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<sup>61</sup> Note that Manin's conception of political deliberation, which he contrasts with Rousseau's view, opens the way for rhetorical forms of justification that may include value-based arguments about character and appeals to emotion, in addition to more rational modes of argumentation (Manin 1987, 346). In a similar vein, Yack (2006, 418) characterizes Aristotelian deliberation as relying on "appeals to character and emotion, as well as the giving of reasons." See also Chambers (2009) discussing the role of "deliberative rhetoric" in democratic politics.

<sup>62</sup> Similarly, Richard Pildes states that "deliberation and competitive theories...are not logically incompatible" (Pildes 2004a, 691). Dennis Thompson likewise indicates that the deliberative value of informed decision-making is "no less central to conceptions that are often contrasted with deliberative theories, such as competitive theories" (Thompson 2013, 372). Thompson calls generally for a more "restrained" approach to deliberative theory in the context of election law (378).

<sup>63</sup> Manin actually indicates that what is required is not actual participation by all, but rather only "the right of all to participate in deliberation" (352). However, he does not clarify why the mere right to participate, even if unexercised by a substantial proportion of the citizenry, should be sufficient to ensure that a decision is legitimate. This issue is explored in detail in Chapter 4 on the *D* term of the calculus.

competence and to more fully justify participatory democratic institutions, greater specificity is needed regarding the minimum informational requirements of voting under this unified liberal democratic theory.

### **c) Epistemic Theory in its Right Place**

Even if the basic assumption of the epistemic interpretation of voting—the existence of independent standards of correctness—is rejected, electoral decisions should still be expected to retain some epistemic qualities. Contrary to Riker, it seems clear that completely uninformed or random voting cannot be viewed as meaningful under any democratic theory. Accordingly, there should presumably be some minimum standard of cognitive capacity required to vote, which would justify, for example, the exclusion of children and adults judged lacking in basic mental abilities.<sup>64</sup>

Furthermore, even competitive theorists generally accept the fundamental value of informed over uninformed decision-making (see Thompson 2013, 372), notwithstanding disagreement about what it means to be informed enough to make a competent voting decision. At the very least, voters should be making decisions based on what they *think* or *know* to be true. This might be described as a weaker, more proceduralist, epistemology of voting, which echoes Robert Talisse’s conception of “folk epistemology” (Talisse 2010). Talisse’s approach entails a minimalist conception of belief that demands only that

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<sup>64</sup> This is a very low standard in epistemic terms. Prevailing legal rules generally state that persons may be judged incompetent to vote only if they “lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice.” *Doe v. Rowe*, 156 F. Supp. 2d 35, 51 (D. Me 2001). Based on this standard, psychiatrists have developed a Competency Assessment Tool for Voting (CAT-V), which tests for basic knowledge of how elections work, and for the ability to formulate a preference between candidates based on stated policy positions (Appelbaum, et al. 2005). Note that although this standard of mental competence can justify the exclusion of young children up to an indeterminate age, the exclusion from the franchise of all minors under the age of eighteen, as well as the exclusion of non-citizens, and the disenfranchisement of those convicted of certain crimes, is not justifiable in epistemic terms.



“[w]hen we believe something, we believe that it is true, as established by what we *take* to be good evidence and sound reasoning” (284). This subjective epistemic standard sets a much lower bar for competent voting, with essentially no room for incorrectly held beliefs, for as Talisse points out, “thinking that a belief is false is inconsistent with maintaining that belief” (id.). This approach can therefore form the basis for a theory of democratic legitimacy that is “consistent with decidedly negative assessments of the deliberative capacities of ordinary citizens” (291). After thus discarding the stronger and more substantive epistemic premise regarding the existence of objectively correct and incorrect voting decisions, the boundaries of minimal competence may be extended much further, obviating many of the concerns of information-based skeptics.

Applying Talisse’s folk epistemology to an interpretation of voting under the unified theory of liberal democracy, voting should be viewed as an exercise of popular control over the substance of public policy, with the high informational demands that would be required by such control. Instead, the purpose of voting is limited to the practical problem of selection and rejection of political representatives. This approach thus builds upon Riker’s liberalism, but it seeks to extend and ground his theory in response to its epistemic critics. What is missing from Riker’s theory is a plausible conception of minimal epistemic standards for making decisions about whether to retain or replace representatives. An elaboration of the basis for such a conception is provided by some of those who have responded to democratic competence skeptics.

David Ciepley, for example, appeals to Max Weber’s understanding of democracy, which holds that “the general problem is not one of securing popular control, but of securing responsible and effective leadership” (Ciepley 1998, 192). Summarizing the knowledge requirements of this Weberian approach, Ciepley states that “what is most crucial is not that the electorate be a good judge of policy, but a good judge of political

character” (222). Ciepley outlines the basic qualities of political character in Weber’s view (215-220), but arguably these types of judgments must be allowed as idiosyncratic and perhaps somewhat opaque even to those making them. What are the essential requirements and qualifications for identifying a good political representative? In the emphatic words of Schattschneider, who would presumably agree with the Weberian approach, “This is a problem of *leadership, organization, alternatives and systems of responsibility and confidence*” (Schattschneider 1960, 138). This approach no doubt raises complex and challenging issues, but what should be clear is that judgments regarding political character and leadership in general are subjective matters that cannot be identified as objectively correct or incorrect.

Considerations of leadership and fitness for office are thus easily detached from strong epistemic conceptions of correctness, and such judgments do not necessarily entail high information costs, since decisions on these matters can often be made on a heuristic basis with relatively little information. Justificatory arguments within a context of conflicting norms and values—fitting Manin’s conception of a deliberative process that legitimates democratic decisions—are commonly made regarding these considerations. With control over policy thus left to government officials, the model of representation that emerges is much closer to Burkean trusteeship than the more populist delegate model in which representatives are expected to reflect the (majority) policy preferences of their constituents. Voters surely do need some information about candidates in order to vote competently under these weaker epistemic standards, but they might not need a great deal, and they almost certainly do not need as much as some of the competence skeptics have assumed. For example, voters may not need to understand the specific functions and responsibilities of various elected officials within the policy process, as Somin suggests is required by even the least demanding theories of representation (Somin 2013, 40-44). If

one trusts in the essential character and leadership capabilities of a candidate (or perhaps at least mistrusts that candidate less than the opposition), there is arguably much less need to understand the minutiae of that candidate's official activities and responsibilities if elected.

Moreover, it is not necessary to completely exclude substantive considerations of policy and issue voting from the weaker epistemology of voting under this representational theory. Policy positions themselves can be seen as projecting particular images of political character and styles of leadership, and they can thus serve—in a manner that does not demand high levels of political knowledge—as additional sources of information about electoral candidates. Furthermore, in the words of Morgan Marietta, “A policy proposal also reveals a value priority” (Marietta 2010, 317). Identifying the “value meaning” of proposed policies does not entail high information costs in terms of policy knowledge, for as Marietta states, “It is not incumbent upon citizens to translate their values into the appropriate policies if they are to be represented; they must only be able to translate proposed or enacted policies into the values they represent” (323). In this manner, beyond aiding in overall assessments regarding character and leadership, the positions of candidates and parties on specific policy issues serve as heuristics for identifying distinct sets of values. The deficiencies in political and policy knowledge cited by competence skeptics do not preclude informed voting for representatives under this system of “value representation,” which according to Marietta, “constitutes an answer to concerns about citizen competence, both empirically and normatively” (325). Absent an understanding of the details of how the political system functions, or the complexities of evidence for and against specific policy proposals, voters may nonetheless be competent to select their representatives based on sincerely held beliefs about the congruence (or lack thereof) of their own values with the values of candidates.

They may then trust their elected officials to formulate and implement public policies in a way that generally reflects these values—or they can seek to replace them at the next election.<sup>65</sup>

Some information is therefore necessary for ensuring competent voting decisions, but it is the type of information that should be easily accessible to the mass of citizens, at least in most major elections. This does not mean that processing available information is necessarily easy, or that overall information costs will always be low. However, the location of the most significant costs in a voting decision could shift from problems of political knowledge to problems of political *attitude*. As discussed earlier, some of what appears as lack of political knowledge could actually reflect psychologically ambivalent attitudes of individuals who have conflicting preferences that they have difficulty resolving. Furthermore, as discussed in Chapter 2, political decisions can often involve complex ethical issues that generate conflict between competing values, so an attitude of ambivalence should not imply incompetence, especially from the perspective that there are no fundamentally right or wrong answers. Indeed, according to Manin, “It is unrealistic, and, more importantly, unjustified, to assume that individuals faced with the necessity of having to make a political decision already know exactly what they want” (Manin 1987, 363-364). Rather, through a potentially taxing process of not just public but also private deliberation,<sup>66</sup> someone with an ambivalent attitude might eventually reach a decision. There is thus no good reason to assume that ambivalent individuals are

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<sup>65</sup> This is obviously an ideal theory to which there may be many objections, not the least of which are issues connected with representation of minorities and other problems of constituency definition, as well as issues of political responsiveness. However, these are more general problems in representational theory, and they pose serious difficulties for strong epistemic approaches as well. Moreover, the direction of democratic reform suggested by the approach advanced here will differ in many ways from the direction of reform under stronger epistemic approaches, as discussed in the following section.

<sup>66</sup> See Goodin (2000) for a discussion of the importance of an “internal-reflective” form of deliberation to enhance democratic functioning and legitimacy, as opposed the more common “external collective” deliberative approach (Goodin 2000).

incompetent to vote—in fact, one might argue that ambivalence is associated with increased competence to the extent that it might demonstrate less ideological rigidity and more openness to deliberation.<sup>67</sup> Manin thus states that an “attitude of constant questioning is surely the warranted one” from a perspective of deliberative legitimacy; yet he emphasizes that in the end, “decisions must be made and conflicts resolved” (Manin 1987, 362). The fact is that political decisions can be very difficult and complicated, and often there will be no easy answers.

In sum, the weaker epistemic requirements for voting that survive under this more expansive information theory for representative democracy are relatively minimal. This does not mean, however, that this theory should be described as minimalist, given how it embodies a jointly competitive, participatory, and deliberative vision of liberal representative democracy. Moreover, the unified theory advanced here allows for stronger epistemic assumptions regarding the (elite) deliberation of representative bodies, which is where the process of informed decision-making may appropriately be held to higher standards, and where detailed understanding of specific public policies is rightly demanded. Epistemic assumptions may also apply to constitutional level decision-making that sets limits on political outcomes based on substantive standards of justice or other

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<sup>67</sup> Note that ambivalence also raises a potentially serious problem with regard to testing for minimal voting competence, and possibly with the underlying legal standard, at least to the extent it is interpreted to require a clear expression of choice. As indicated, the prevailing standard is that individuals may be judged incompetent only if they “lack the capacity to understand the nature and effect of voting such that they cannot make an individual choice” (see *supra* n. 64). The CAT-V tests the ability to “make an individual choice” by providing a hypothetical of two candidates with opposing positions on health insurance and government spending. Subjects who express a clear preference between candidates receive full credit, while subjects who express a choice that is “ambiguous or vacillating” receive only half credit, and subjects who state they are unable to make up their mind receive no credit (Appelbaum, et al. 2005, 2099). In addition to the fact that there could be areas other than health care policy and government spending in which subjects could have clearer preferences, the deeper problem is the possibility that ambivalent attitudes will be interpreted as evidence of incompetence. A better test might perhaps try to determine whether an apparent inability to choose is truly a product of failure to understand “the nature and effect of voting,” as the legal standard would seem to require, and not simply a failure to formulate a clear preference in response to a given hypothetical.

normative ideals that are presumed objectively true or correct. In both these areas there is arguably room for reform aimed at improving the epistemic quality of decision-making.<sup>68</sup> However, the place where strong epistemic assumptions should not be welcome, and where the correctness of individual decisions should not be open to question, is in the rules and procedures for voting, as discussed in the following section.

## **5) IMPLICATIONS FOR ELECTION LAW AND POLICY**

As emphasized in the introductory section, and in the introduction to the dissertation, democratic theory is not just theoretical; it has important implications for the law of democracy and for policy choices that establish the rules and procedures for the administration of elections. This section discusses implications of the unified theory advanced above with regard to three areas of democratic electoral institutions: a) high-level constitutional design, b) Supreme Court election law doctrine, and c) electoral policy reform in general.

### **a) Constitutional Design Implications**

To begin, the distinction between epistemic-populist theory and the unified theory of liberal democracy advanced here has important implications for constitutional design at the highest levels. A principal implication has already been alluded to earlier in discussing the information requirements of representative democracy, as follows: In seeking to ensure that the popular will is embodied in government decisions, the

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<sup>68</sup> For example, proposals for campaign finance reform and other procedural regulations to limit the influence of moneyed interests on the political process can be viewed as principally aimed at improving the epistemic qualities of the deliberation of representatives. In constitutional decision-making, the focus is on disputes over the substance of epistemic standards of justice or moral truth that should be removed from democratic electoral control, although there of course deep disagreements about these matters. See also Invernizzi-Accetti and Wolkenstein (2017) on possibilities for deliberative reform within political parties.

epistemic-populist interpretation of voting—and deliberative democratic theory more generally—makes demands that are more closely associated with direct than representative democracy. Such epistemic-populist demands might be also consistent with representative institutions under a stronger, delegate model of representation, but the overall affinity for direct democratic forms can be seen clearly in Fishkin’s distinction between elite deliberation and his conception of true deliberative democracy with decision-making “by the people” (Fishkin 2009, 73). The unified liberal theory, on the other hand, is firmly grounded in representative institutions, and though it might not necessarily exclude some features of direct democracy, these could actually remain more open to doubts about mass competence.

Moreover, the theory advanced here is not only grounded in representative institutions, but it also clearly entails a specifically *electoral* vision of democracy, since it values and relies on mass participation to confer normative legitimacy. This precludes attempts to fashion epistemically ideal deliberative conditions through random selection of representatives—or sortition—in which a representative sample of citizens is selected by lottery to serve as legislators. The proposal to eliminate the election of political representatives, which has been considered specifically as a response to Fishkin’s trilemma (Levinson 2012, 129-130), is motivated largely by epistemic anxieties about the competence of the masses to elect the best representatives (see e.g. Landemore 2013, 117). Elections are necessary, however, under the theory advanced here, in order to satisfy the value of participation that confers normative legitimacy on the selection of representatives, which sortition fails to provide.<sup>69</sup>

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<sup>69</sup> From the perspective of improving the outcomes of representative assemblies, where the theory advanced here does allow for strong epistemic assumptions, a system of sortition could arguably be justified as a reform that works to “ensure that bad reasons are unable to affect a decision” (Stone 2009, 375). However, as Stone explains, sortition also ensures that potentially *good* reasons cannot affect a decision (382), which becomes problematic assuming the existence of political expertise, which a randomly

The inclination toward sorition is an example of the desire among deliberative theorists to manufacture democratic “microcosms” through systems of random selection, which Simone Chambers describes as an overall approach in which “the mass public is abandoned in favor of mini-publics” (Chambers 2009, 324). This is deeply problematic, according to Chambers, for the belief that such randomly selected mini-publics provide the only opportunities for “genuine” deliberation implies a rejection of the “broader democratic public sphere as a place to pursue reasonable politics” (330-331). In this sense, deliberative theory—with its epistemic-populist interpretation—can be seen as a theory that “moves the heart of democracy away from the vote” (Chambers 2003, 311). In contrast, the unified liberal theory, which views elections primarily as competitive mechanisms for more or less reasonable decision-making about political power and leadership, allows for a stronger normative embrace of broad electoral participation, and thus brings the “heart” of democracy back to the vote, where it arguably belongs.

Furthermore, this theoretical approach also tends to weaken arguments on the merits of “foot voting” over “ballot box voting” (Somin 2013, 114), which likewise seems to discount the foundational value of electoral participation. Somin’s argument on this point in fact relies heavily on epistemic conceptions of mass ignorance and incompetence, and on (see 121-126).<sup>70</sup> Responding to political conditions by moving to another jurisdiction—if feasible—certainly has its place in an liberal democratic society,

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selected citizen is likely to lack. This raises complex issues beyond the current scope, but it seems safe to conclude that deliberative deficiencies in current representative institutions might be addressed by other reforms (see *supra* n. 68), short of disbanding them and moving to a system of sortition. See also Chapter 4 (n. 80 and accompanying text) for a discussion of how sortition fails to account for voting as an expression of popular sovereignty.

<sup>70</sup> Somin bases his argument on the purported disincentive for information acquisition associated with the pivotal voting problem and the theory of rational ignorance (121). Somin’s further arguments for a more limited national government with increased decentralization of power (139-143), as well as his arguments in favor of strong judicial review (155-164), are beyond the scope of this chapter, but they also rely heavily on questionable epistemic assumptions of mass ignorance and incompetence.



but foot and ballot box voting should not be viewed as “realistic alternatives” to one another, as Somin frames them (120). Opportunities for voting with one’s feet might indeed be a valuable complement to electoral democracy, but the primacy of electoral participation should not be minimized based on dubious assumptions of mass democratic incompetence.

### **b) Implications for Election Law Doctrine**

The unified theory’s emphasis on the essential value of mass electoral participation, with its rejection of strongly epistemic interpretations of voting, has important implications for election law issues relating to the substantive costs of voting. As indicated in this chapter’s introduction, most normative theories in election law scholarship are motivated by structural approaches aimed at second-generation voting rights issues, which generally fail to provide strong foundations for the protection of an individual-level participatory right in cases involving claims of vote denial.<sup>71</sup> Some election law scholars have expressed skepticism about enforcement of the right to vote using traditional individual rights analysis, and have argued explicitly against the notion that voting costs should be reduced in the name of participatory interests backed by individual-level claims (Elmendorf 2008; Flanders 2013).<sup>72</sup> What is largely missing is a

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<sup>71</sup> In fact, the fundamental value of participation may be seen as contested in American constitutional jurisprudence. Tushnet, for example, has argued against the claim that “participation is the basic value embodied in the Constitution,” and more generally against “enshrining participation in a constitutional theory” (Tushnet 1980, 1046, 1048). Michelman has observed that while “constitutive valuations of political participation rights” are present in the Supreme Court’s election law jurisprudence, such values are “never unanimously and always obliquely” suggested (Michelman 1989, 459).

<sup>72</sup> According to Elmendorf, courts should adopt “an expressly structural understanding of the right to vote, while scaling back the individual right to vote free from burdens that are not shared by others” (Elmendorf 2008, 644). Flanders states, “Someone who is subject to inconvenience or delay is not being denied his right to vote; he still has the ability to participate. So there is no violation of the fundamental value of participation” (Flanders 2013, 65). But see Douglas (2013, 83), stating, “The broader concept of voting and participation as a foundational right places an affirmative duty on governments to create an easy voting process and avoid unreasonable obstacles, even if the barriers impact everyone the same.” Douglas

coherent normative vision capable of supporting highly participatory electoral institutions with low substantive costs enforced through an individual rights-based approach to claims of vote denial.<sup>73</sup> Abandoning epistemic conceptions of voting in election law allows for such a participatory democratic vision.

The unanimous decision of the Supreme Court in *Lassiter v. Northampton Election Board*,<sup>74</sup> which affirmed the constitutionality of literacy tests based on the state's interest in promoting "intelligent use of the ballot," provides a classic example of the operation of epistemic theory in the rules for voting. While the Court has never explicitly overruled this case, Hasen expresses doubts about whether the constitutional ruling of *Lassiter* remains good law<sup>75</sup>—apart from the prohibition of such tests under the Voting Rights Act of 1965 and subsequent amendments;<sup>76</sup> however, Hasen admits that a literacy test "is not wholly irrational if one views voting as a means for choosing the best candidates" (Hasen 2003, 83). Hasen himself indicates that such assessments of voting

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indicates that voting rights should be seen as having both individual-level and structural components (84, n. 11).

<sup>73</sup> As indicated, Joseph Fishkin's (2011) work is a notable exception on this point (see *supra* n. 9). Note that none of the above is meant as an argument against structural theories of voting rights for cases involving vote dilution and gerrymandering, but as Fishkin indicates, cases of vote denial require the development of a theory of "how disenfranchisement harms individuals" (Fishkin 2011, 1332); see also Ellis (2014, 550), stating that current election law jurisprudence "fails to fully recognize a complete notion of harm toward the voter."

<sup>74</sup> 360 U.S. 45 (1959).

<sup>75</sup> Hasen indicates that the holding of *Lassiter* may have been implicitly overruled by *Kramer v. Union Free School District No. 15* (395 U.S. 621 (1969)), but he also suggests that the majority in *Kramer* may have intentionally avoided overruling *Lassiter* (Hasen 2003, 26, 64). Michelman also raises the question of whether literacy tests remain constitutionally permissible after the Court's invalidation of state poll taxes in *Harper v. Virginia Board of Elections* (383 U.S. 663 (1966)), and he associates the potential acceptability of literacy tests with a "deliberative-politics premise" that is "republicanly grounded" (Michelman 1989, 480-481).

<sup>76</sup> The original version of the Voting Rights Act of 1965 prohibited the use of any "test or device" in covered jurisdictions, and effectively precluded the use of English literacy tests nationwide with respect to individuals who had completed the sixth grade (Voting Rights Act (VRA) of 1965, §§4(a), (e)). In 1970 the prohibition on all tests or devices was made universally applicable for a period of five years (VRA Amendments of 1970, §201), and in 1975 the Act was amended to make permanent the nationwide prohibition on tests or devices (VRA Amendments of 1975, §102). The VRA is currently codified at 52 U.S.C. §10101 *et seq.*

competence are objectionable from the perspective that “politics is about the division of power among political equals; it is not a ‘test’ to find the ‘best’ candidate” (id.).<sup>77</sup> However, the meanings and implications of political equality are of course highly contested, and Hasen does not directly address the epistemic-populist arguments in favor of higher costs intended to ensure more competent voting. The unified liberal theory advanced here provides a much stronger foundation for overruling *Lassiter*, by explicitly rejecting the epistemic-populist conception of objective standards for voting decisions.

The status of the holding in *Lassiter* is probably a mostly hypothetical point, for it appears unlikely that competency exams will be reinstated in the U.S., notwithstanding calls from some quarters for instituting such qualifications to ensure a more informed electorate (Brennan 2011b; Harsanyi 2016).<sup>78</sup> However, the normative approach advocated here would not only exclude such seemingly reactionary reform proposals based in epistemic assumptions; it would also preclude arguments that higher substantive costs should be allowed for the purposes of improving the quality of democratic outcomes. More generally, this approach provides guidance with regard to the standard of review for vote denial cases and the constitutionality of various aspects of the “nuts and bolts” of election administration. A focus on low-cost access, enforced under traditional individual rights analysis, entails a perspective that requires the government to bear most of the costs of administering elections, and not to shift these costs unnecessarily to individual citizens in way that burdens their participation. This suggests a stricter

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<sup>77</sup> Hasen elsewhere associates this distinction with liberal versus conservative perspectives on the franchise (see *supra* n. 12). However, it should be clear from the discussion of how deliberative theory is associated with epistemic-populist ideas that it is not just political conservatives who express concerns about the quality of voting decisions and the problems of political information deficiencies.

<sup>78</sup> David Harsanyi argues that voters should be required to pass the U.S. naturalization exam. Somin states that he is sympathetic in principle to these types of proposals to ensure intelligent voting, but he withholds his support due to practical concerns of bias in the implementation of any competency exam (Somin 2016; see also Somin 2013, 181-183).

standard of review for election administration than has been applied in the Supreme Court’s jurisprudence to date, which has generally allowed “reasonable nondiscriminatory restrictions” on voting if the state interest is judged on balance to be “sufficiently weighty.”<sup>79</sup>

As scholars have pointed out, this balancing approach does not compel the type of strict scrutiny analysis conventionally applied to claimed infringements of fundamental rights, but rather appears to reflect a somewhat lower standard of review (Elmendorf 2007, 394; Douglas 2008, 151-157). By contrast, the normative approach to voting costs advocated here supports arguments for application of strict scrutiny to any administrative procedure that directly burdens the individual right to vote in a manner not narrowly tailored to meet a compelling state interest (Douglas 2008, 175-177). Importantly, this standard entails an emphasis on requiring the government to show that its voting regulations represent the least restrictive means of satisfying its compelling interests, and it would allow voters challenging these regulations to suggest alternative procedures for meeting those interests (186-195). Furthermore, this approach also supports arguments that a state or local government’s proffered interests in voting regulations should not be accorded much deference by courts (Douglas 2015; Schleicher 2016; Tolson 2015).

This of course does not mean that governments can never demonstrate that their voting regulations are necessitated by genuine concerns for administrative efficiency and/or electoral integrity. However, strict voter identifications laws, for example, are not likely to be justified under this standard if there are examples of other states that are able

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<sup>79</sup> *Crawford v. Marion County Election Bd.* 553 U.S. 181, 190 (2008), citing standards articulated in *Burdick v. Takushi* 504 U.S. 428 (1992) and *Norman v. Reed* 502 U.S. 279 (1992), and the balancing approach set forth in *Anderson v. Celebrezze* 460 U.S. 780 (1983).

to meet those compelling interests using less stringent identification procedures.<sup>80</sup> Furthermore, the common practice in most states of closing the registration rolls prior to Election Day might not pass constitutional muster under a strict scrutiny test. Requiring prior registration undeniably represents a burdensome substantive cost—as is clear from empirical research demonstrating the turnout effects of EDR and SDR—and given that many states have successfully implemented these procedures, the added cost of requiring separate registration prior to voting would likely fail to meet the least restrictive means prong of the strict scrutiny test.<sup>81</sup> At the very least, partisan manipulation of electoral rules will obviously never provide a compelling interest, and thus a clear showing of partisan intent should be sufficient to strike down any burdensome administrative practice (Foley 2013).

### **c) Implications for Electoral Policy Reform**

In terms of electoral policy more generally, the work of scholars with a broadly participatory agenda receives much needed support from the rejection of epistemic-populist interpretations of voting. For example, Spencer Overton has argued for an “inclusionary vision of democracy,” which “values widespread participation and looks to remove criteria or conditions that act as barriers to such participation” (Overton 2001,

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<sup>80</sup> See the dissenting opinion by Justice Breyer in *Crawford*, arguing to invalidate Indiana’s voter ID law based on evidence that other states had implemented less restrictive procedures (553 U.S. 181, 239-240 (2008)); also see Douglas (2008, 194).

<sup>81</sup> The prevailing Supreme Court decisions on registration requirements are apparently still *Marsten v. Lewis* 410 U.S. 679 (1972), and *Burns v. Fortson* 410 U.S. 686 (1973), both of which approved a 50-day registration cutoff in the interests of administrative efficiency and fraud prevention. Given the considerable advancements in information technology since the early 1970s, combined with the successful implementation of EDR and SDR in several states, it would seem unreasonable to assert that any prior registration requirement would still be justifiable today, unless a state can show otherwise. The VRA provides for a maximum 30-day cutoff for registration in presidential elections (VRA Amendments of 1970, §202(d)). See also James (1987, 1617), arguing that any requirement of advance registration “is a *per se* restriction of the right to vote.”

474). He contrasts this approach with a “merit-based vision,” which he argues is problematic from a structural—rather than individual rights—perspective (480), but Overton seems never directly to confront the underlying epistemic assumptions of this “merit-based” approach to voting in democratic theory. Similarly, Tova Wang advocates for a “voter inclusion principle” in election law and policy on the basis that it “strengthens the very concept of democracy, both as a collection of institutions and for the individual voter” (Wang 2012, 10), yet again, she does not seem to elaborate any theoretical basis for favoring this participatory principle over strong epistemic conceptions. The unified theory advanced here can thus help to shore up the normative foundations for these types of policy arguments for participatory-based reforms that aim generally to ease access by reducing the substantive costs of voting.

More broadly, a stricter standard of judicial review for substantive cost allocations would likely lead to greater uniformity in election administration among states, perhaps paving the way toward new federal legislation of minimum standards for voting access, which might include nationally applicable identification and registration requirements (Hasen 2005, 969; Tokaji 2014, 100-104).<sup>82</sup> In fact, federal legislation setting minimum

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<sup>82</sup> Hasen advocates for a federal system of government initiated universal registration, including provision of federal voter identification cards, while Tokaji advocates government initiated registration at federal and state levels, with federal mandates for online and same-day registration as well as uniform identification requirements. See also Hasen (2012, xii, 198), and Cain (2015, 198-200), arguing generally for national standards to provide more uniformity in election administration. Federal authority under the Constitution might actually be somewhat unclear in this area, given unresolved interpretative questions about whether administering registration and identification requirements should be viewed as part of regulating the “manner” of voting, and thus within the authority of Congress under the Elections Clause of Article I, Section 4, or rather a part of voter “qualifications,” which are subject to state control under Article I, Section 2 (and under the 17<sup>th</sup> Amendment). As Derek Muller explains in his analysis of *Arizona v. Inter Tribal Council*, the Court in that case confirmed that regulations related to voter registration are generally within the scope of “Times, Places, and Manner” in the Elections Clause, but the opinion left open the question of whether aspects of the registration process, such as requiring proof of citizenship, as well as identification requirements, could be seen as implicating the authority of the states to enforce voter qualifications (Muller 2014, 316-317, 319-320). See also HLR (2013, 203-207), discussing the Court’s failure in *Arizona v. Inter Tribal* to clarify the distinction between federal power under the Elections Clause and state authority to regulate voter qualifications. Note that even if an administrative procedure is

national standards for election administration has been suggested as a replacement for the anti-discrimination approach of the Voting Rights Act (Pildes 2006b, 756), and support for this new approach may be gaining force after the Supreme Court’s invalidation of Section 4 preclearance procedures in *Shelby County v. Holder*<sup>83</sup> (see Issacharoff 2013).<sup>84</sup> With regard to the various forms of convenience voting, including early and absentee options, the evidence on participatory effects is still preliminary and mixed, so continued experimentation at the state level may be justified notwithstanding a presumption in favor of expanding opportunities for low-cost access. Further state-level experimentation with government-initiated systems of “universal” or “automatic” registration may also be justified before attempting to implement this type of reform at the federal level (see Tokaji 2008, 502-504).<sup>85</sup> But the testing in the “laboratories of democracy” must at some point stop and take account of its experimental results (see Tokaji 2009a, 267), and the findings seem fairly clear at least with regard to EDR and SDR: Eliminating registration as a separate cost can improve participation without compromising efficiency or integrity.

The normative approach advanced here also has implications for electoral policy in second-order state and local elections, which are subject to more significant participatory problems, as discussed previously. The issues surrounding the timing of state and local elections are complex, but the mandate for low-cost participation should

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considered a voter qualification, strict scrutiny could nevertheless trigger invalidation of state regulations on other constitutional grounds (see Tolson 2015, 206-212).

<sup>83</sup> 133 S. Ct. 2612 (2013).

<sup>84</sup> Issacharoff admits that federal authority under the Elections Clause is “untested,” but he indicates that there is “room for expansion of congressional intervention” in moving beyond the discrimination model of voting rights enforcement (Issacharoff 2013, 113). But see Bagenstos (2014, 2870-2875), arguing that “universalist” approaches to voting rights may fail to offer sufficient protection against racial discrimination.

<sup>85</sup> As Tokaji explains, a policy of “universal” registration involves a proactive undertaking of government responsibility for registering voters, while “automatic” registration involves citizens being registered—unless they affirmatively opt out—when they interact with a government agency (Tokaji 2008, 499, 503). As of this writing, automatic registration has been implemented in Oregon, and six other states and DC have authorized such policies (NCSL 2017). See also Kennedy et al. (2016).

generally argue in favor of concurrent scheduling with first-order races. Admittedly, in these elections there may be information deficits of the kind that could present real difficulties even under the weaker epistemic standards of the unified liberal theory, which as discussed, still requires some rudimentary information about the options on the ballot or reliable heuristics to substitute for such knowledge.<sup>86</sup> Particularly in local races with relatively little media publicity, and where party cues are generally absent, informational challenges may preclude the ability of citizens to make even basic judgments of character and leadership or to identify value-congruent candidates. However, in place of being satisfied with low and biased turnout, or relying on solutions like Somin's that emphasize exit over voice, reform efforts could instead focus on policies designed to facilitate more informed voting in these elections. Elmendorf and Schleicher discuss a range of potential reforms along these lines, including the development of state and local party brands to provide partisan cues that do not simply mirror the positions of national parties, or employing substitutes for such cues, such as official endorsements or ballot notations to provide information outside the context of party affiliation (Elmendorf and Schleicher 2013, 409-419).<sup>87</sup>

In sum, the interpretation of the information costs of voting under the unified theory of liberal representative democracy advanced here—with its rejection of strong epistemic standards in election law and policy—lends support to participatory-based reforms that aim to minimize substantive voting costs, and prohibits any efforts to improve the ostensive quality of electoral decisions by increasing these costs. Even

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<sup>86</sup> See also the discussion of second-order elections and ways of addressing their informational problems in Section 4 of Chapter 2.

<sup>87</sup> Elmendorf and Schleicher's approach reflects a more minimalist interpretation of electoral competence generally consistent with the approach of this chapter. They accordingly conclude, "The central function of election law is to help citizens aggregate what little information they have into collectively sensible judgments about whether the people running the government should continue at the helm" (431).



further, the emphasis on cost minimization suggests the policy option of reducing effective costs by introducing an incentive for voting, either in the form of a fine for unexcused abstention—as imposed by compulsory voting laws in some democracies, such as Australia—or with some form of compensation for turnout, which would have the same cost-offsetting effect.<sup>88</sup> Without delving here into the debate on this topic, the point of emphasis for now is that a primary argument against incentives to encourage voting involves concerns for the “quality” of increased turnout under these participatory policies (see Rose-Ackerman 1985, 966-967; Somin 2015; Will 2014).<sup>89</sup> The unified theory advanced here rejects that epistemically-based argument, and responds to the information-based criticism of compulsory voting with a coherent account of low information costs under representative institutions, thus defining a broader standard of voter competence that is more consistent with policies aiming better to realize a mass participatory vision of democracy.

Admittedly, the introduction of monetary incentives for voting seems like a fairly radical reform proposal, and presumably is not something that politicians—or even scholars—are likely to agree upon at any time in the near future.<sup>90</sup> There indeed seems to be very little room for reaching any consensus on electoral reform these days.<sup>91</sup> In the

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<sup>88</sup> In formal terms, both these approaches to cost reduction can be modeled by the  $D$  term of the voting calculus, and they are discussed in more detail in Chapter 4, along with the complex normative issues surrounding compulsory voting laws and other incentives for turnout.

<sup>89</sup> In arguing against a policy of compulsory voting enforced by fines for abstention, Rose-Ackerman asserts that when exercising the right to vote is “slightly costly,” voters are more likely to be well informed and make better choices. Somin similarly states that “mandatory voting would exacerbate the already severe problem of voter ignorance,” and Will writes, “If money is necessary to lure certain voters to the polls, those voters will lower the quality of the turnout.” Note that in response to Rose-Ackerman, Karlan indicates that concern for voters making “bad” choices raises “an epistemological difficulty” (Karlan 1994, 1474, n. 60).

<sup>90</sup> But see the discussion in Chapter 4, Section 5 regarding some practical possibilities for offsetting the costs of voting through implementation of a constitutional duty to vote.

<sup>91</sup> For example, the bipartisan Presidential Commission on Election Administration, which was established by President Obama following the 2012 elections, was able to reach agreement only on some minor reforms aimed at reducing substantive costs, including online registration and early voting, and a standard

short term at least, the prospects for “getting from here to there in election reform” (Gerken 2009, 6) seem highly uncertain. In the longer term, a fuller resolution of the voting wars may only be obtainable through judicial intervention that sets minimum standards of access through stricter enforcement of voting rights, and/or federal mandates for increased uniformity in election administration. In the meantime, principled discussion of voting regulations and their substantive costs should directly address the underlying theoretical assumptions of opposing sides in matters of election law and policy. If a way forward out of the voting wars is to be found, it will be by way of a more stable and secure bridge between the theories and practices of elections.

## **6) CONCLUSION**

Beginning with the *C* term of the voting calculus, this chapter has examined the two basic types of voting costs: substantive costs arising from the practical burdens associated with casting a ballot, and information costs associated with deciding how to vote. The primary aim of the discussion has been to demonstrate that these two types of costs are related in a manner that depends on fundamental assumptions about the role of voting in a modern democracy. A comprehensively unified theory of liberal democracy has been outlined to demonstrate that strong epistemic assumptions—in the form of objective standards for judging the correctness of voting decisions—are not necessary for a coherent model of mass democracy that incorporates all the essential democratic values and supports highly participatory electoral institutions.

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recommendation that wait times not exceed 30 minutes. The Commission apparently did not even address the topics of prior registration or the substance of voter identification requirements, which continue to elicit strong partisan disagreement (Bauer and Ginsberg 2014).

Schattschneider has written of a need “to reexamine the chasm between theory and practice,” stating that “it is at least as likely that the ideal is wrong as it is that the reality is bad” (Schattschneider 1960, 131). This chapter represents an attempt to bridge that chasm by describing an approach to information in democratic theory that allows more space for competing versions of “truth” in politics. Without addressing the deeper philosophical issues raised by this approach, this perspective seems particularly desirable for American politics today, given the apparent entrenchment of ideological intolerance in the currently highly polarized environment. Indeed, when individuals or groups believe they hold a conceptual monopoly on the truth, backed by the strong epistemic assumption of objectively right and wrong answers to political questions, it may actually threaten democratic stability. At its core, democratic politics requires a minimum degree of open-mindedness and willingness to compromise, including “at least some tolerance of differing truths” (Crick 1993, 18). This is the normative approach that should be reflected in the rules and procedures for elections, so that those who find themselves on the losing side do not come to believe that “evil has triumphed over good” (Holcombe 2013, 24),<sup>92</sup> but rather that they were simply outvoted and must work to realize their version of truth in future democratic decisions.

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<sup>92</sup> The larger quote from Holcombe—in which he is criticizing Jason Brennan’s view on objective standards of common good in electoral outcomes—is worth highlighting: “Brennan is telling voters that when they end up on the losing end of an election, evil has triumphed over good; the common good has been defeated. This is much different from concluding that most people wanted this while I wanted that, and so I was outvoted.”

## Chapter Four: The *D* Term and the Duty to Vote

“Belief in a duty to vote is the opiate of democratic masses.”

–Loren Lomasky & Geoffrey Brennan (2000, 86)

“[A]n action from duty has its moral worth not *in the aim* that is supposed to be attained by it, but rather in the maxim in accordance with which it is resolved upon...”

–Immanuel Kant (2002 [1785], 15)

### 1) INTRODUCTION

It is by now clear that citizens participate in democratic elections for many different reasons, and that the context of elections, including the institutions that structure them, can have varying effects on individual motivations for turning out to vote. In discussing the instrumental benefits of voting, the possibility was raised of an ethical duty to participate for instrumental reasons associated with the outcome (Chapter 2, Section 3b); however, is there—or should there ever be—a duty to vote irrespective of any expected effect on the electoral outcome? Many citizens believe that voting is their civic duty, and they will insist on participating even when it seems instrumentally useless. Elections are in an important sense constitutive of democracy as “government by the people,” and thus citizens may desire or feel obliged to vote for reasons that having nothing to do with the electoral outcome. How should these reasons be viewed as a matter of normative theory and constitutional design? Should voting be encouraged through the design and implementation of institutions such as compulsory voting so that citizens will participate even absent perceptions of instrumental benefits, or might it perhaps be preferable to discourage participation for non-instrumental reasons? These are some of the questions that are addressed in this chapter.

The *D* term in the rational choice calculus of turnout—which represents the expressive or otherwise non-instrumental benefits of voting—originated as a solution to problem of pivotal voting theory and the so-called paradox of turnout, as discussed in Chapter 1 (Section 2). However, even if the alleged paradox of turnout were resolved so that the expected instrumental benefits of voting in a large—but competitive—election were not always statistically equivalent to zero, there would remain a need for an account of non-instrumental benefits in order to fully explain the motivations of turnout. For one thing, a theory of non-instrumental benefits is necessary to explain motivations for voting in clearly non-competitive elections. Furthermore, there may also be expectations of negative utility in the act voting—such as in the perceptions of alienated citizens who do not wish to participate in what they see as an illegitimate democratic process. This form of expressive disutility modeled in the *D* term must then be weighed against any perceived instrumental benefits.<sup>1</sup> Perhaps most importantly, the propensity to vote may be affected by various types of external pressures and incentives, both social and institutional, all of which can provide non-instrumental motivations for voting. Finally, there may be deeper reasons for voting that transcend the assessments of individual or social utility symbolized by the calculus, for if voting is viewed as a civic duty, citizens may come to see their participation as fulfilling a greater obligation in some sense.

This chapter will proceed as follows: Section 2 reviews some of the existing literature on the *D* term of the calculus and discusses both theoretical constructs and empirical evidence of non-instrumental motivations for voting. Section 3 begins to focus on the constitutional-level issue of whether voting should be structured as a voluntary

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<sup>1</sup> See Chapter 2, Section 3b. Negative utility from the act of voting might also be framed as part of the *C* term, or the costs of voting, but *C* conventionally represents logistical or informational costs that must be paid before participating (as entry costs). This chapter will focus mostly on representing positive benefits in *D*.

choice or as a duty of citizenship, and it then reviews some administrative implementations of the duty to vote cross-nationally, as well as and some empirical studies analyzing the effects of these institutions. Section 4, which takes up the bulk of the chapter, elaborates the normative arguments concerning whether voting should be a civic duty or a voluntary decision. This section first outlines an argument for a constitutional duty to vote based on Rawlsian principles of justice. It then responds to some of the main arguments against the duty to vote, and it concludes by exploring possible limits on the duty, both in principle and in the practice of compulsory voting. Section 5 discusses implications for election law and policy that follow from this analysis of the duty to vote, with a focus on the U.S. Constitution and the administration of American elections, and briefly discusses the prospects for some form of compulsory voting in this country. Section 6 concludes with a general discussion of the overall argument of this chapter: namely, that recognition of a civic duty to vote supplies the missing normative foundation for broadly participatory theory and practice under modern conditions of liberal democracy.

## **2) MODELING THE *D* TERM**

As indicated, the *D* term in the rational choice calculus of voting represents the value attached to any expressive or otherwise non-instrumental benefit of participation, including the perception of a civic duty to participate in elections. *D* has also been described as representing the consumption—as opposed to investment—benefits of voting (Ferejohn & Fiorina 1974, 526). The foundation for adding this term to the voting calculus lies in Anthony Downs' original solution to the apparent paradox of voter turnout, in which he suggests that notwithstanding the negligible possibility of being

pivotal, a rational citizen might nevertheless decide to vote after considering that democracy itself would be imperiled if no one participated (Downs 1957a, 266-271). Downs refers to this as the “long-run participation value” of voting (270). Of course, Downs’ solution that individuals will decide to vote in order to save democracy runs into the same collective action problem that he originally described, since individuals might still reason that their one vote is highly unlikely to be pivotal to saving democracy (Fiorina 1976, 392). In their formalization of the *D* term in the calculus, Riker and Ordeshook confront the paradox more directly by defining *D* in explicitly ethical, or social-psychological terms. They thus list several different types of “positive satisfactions” that a citizen might receive from the act of voting, even indicating that some of what are generally considered to be costs of voting might be perceived by some individuals as benefits (Riker & Ordeshook 1968, 28).

The *D*-term solution to the paradox was criticized early on for offering a tautological and non-predictive model of the voting decision (Barry 1970, 13; but see Riker and Ordeshook 1968, 26-27, n. 7). If the intrinsic or consumption benefits of participation are essentially responsible for all of the “action” in the calculus (Fiorina 1976, 393), the rational choice explanation of voting seems reduced to simply: citizens vote because they like voting (Aldrich 1993, 258). This raises some difficult theoretical problems having to do with the nature and definition of rationality and whether expressive motivations for voting properly belong in a rational choice model of turnout (see e.g. Goldfarb and Sigelman 2010). Nevertheless, surveys generally confirm that the individual sense of a civic duty to participate in elections irrespective of any effect on the outcome is a major factor in reported reasons for voting, even where participation is formally a completely voluntary decision (Blais 2000, 92-114; Blais et al. 2000, 190;

Bowler and Donovan 2013, 266; Smets and van Ham 2013, 352; Elliot 2017, 660).<sup>2</sup> Similarly, social pressure to participate, which represents another source of expressive or non-instrumental motivations, has also been found to exert a significant effect on the propensity to vote (Kenny 1992; Gerber et al. 2008; Funk 2010; Davenport et al. 2010). Therefore, to the extent that there may in fact be both instrumental and expressive motivations for voting, the *D* term is an important addition to the calculus, as it allows at least formal specification of these two components of the turnout decision (Fiorina 1976, 393). However, separating out these motivations in practice, or attempting to show that expressive motivations predominate, turns out to be a difficult problem.

Several empirical studies have looked for evidence of primarily expressive motivations in voting, but this literature appears inconclusive and troubled by methodological difficulties. Building on the assumption that expressive motivations are expected increasingly to dominate as the chance of being pivotal decreases, some experimental studies confirm that varying the probability of being pivotal leads to changes in preferences that seem to reflect the dominance of expressive motivations (Carter and Guerette 1992, Fischer 1996, Feddersen et al. 2009). But these are relatively small-scale laboratory experiments that may have external validity problems when

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<sup>2</sup> In 2010, the American National Election Studies (ANES) began directly asking whether respondents believed voting to be a duty or a choice, with just over 50 percent of respondents saying it was a duty, and over 35 percent of those reporting a strong sense of duty (Achen 2012, 1). Results were similar when the question was asked in the 2012 presidential-year study, with just under 50 percent reporting that voting is a duty (ANES 2015a, 358). Several previous versions of the ANES between 1952-1992 asked for agreement or disagreement with the statement, “one shouldn’t vote if one doesn’t care about the outcome,” which garnered on average about 50% disagreement (ANES 2015b). Comparatively, the United States appears to fall on the low end of a reported duty to vote, with about 75% of British respondents agreeing that voting in parliamentary elections is a civic duty (Bowler and Donovan 2013, 269), and upwards of 80% of respondents holding this view in Canadian surveys (Blais 2000, 95). Elliot cites 25 years of survey evidence (from Pew Research Center) consistently showing that about 90 percent of Americans either completely or mostly agree with the statement, “I have a duty to always vote,” but he also notes polls showing much less agreement with the duty to vote when respondents are given a choice between categorizing voting as a duty or a right (Elliot 2017, 660).



applied to large electorates under real political conditions, and moreover, other experimental studies have failed to confirm these findings (Tyran 2005, Morton and Tyran 2012). Additional studies have found at least implicit evidence of expressive motivations in survey data (Guttman et al. 1994, Copeland and Laband 2002, Jones and Dawson 2007, Bäck et al. 2011). However, it is theoretically difficult to distinguish instrumental from expressive motivations with certainty based on these data, since almost any apparently expressive behavior or opinion could potentially be explained in subjectively instrumental terms (Toka 2009, 277; see also Fischer 1996, 172).<sup>3</sup>

Similarly, some of the apparent evidence for instrumental motivations, such as the well-documented relationship between turnout and the expected closeness of an election (see Blais 2000, 60; Blais 2006, 119), or observations of strategic voting in favor of a less-preferred candidate (Cox 1997), could also be explained in non-instrumental terms (see Aldrich 1993, 266-269; Toka 2009, 277).<sup>4</sup> Motivations may also be characterized as instrumental without relating directly to the outcome of the election at hand; for example, one might vote to contribute to the political “mandate” of one’s preferred candidate or party (Guerrero 2010; Mackie 2014).<sup>5</sup> There is also a related conceptual problem in distinguishing between motivations for turnout, conventionally assumed to be expressive, and motivations for vote choice, which have generally been assumed to be instrumental, although some argue this latter assumption is unwarranted (Schuessler 2000, 89; Toka

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<sup>3</sup> For example, Guttman et al. (1994) argue that abstention due to alienation (as opposed to indifference) is evidence of expressive motivation, but as discussed in Chapter 2 (Section 3b), abstention due to alienation can also be modeled in terms of instrumental utility when it leads to functional indifference.

<sup>4</sup> Aldrich suggests that turnout effects for close elections and strategic voting can both be explained by the influence of campaign mobilization, while Toka suggests they can be explained by individuals seeking a “thrill” of voting in a close election, or escaping an “uncomfortable feeling” of not voting strategically (see also Guttman et al. 1994, 204).

<sup>5</sup> This motivation should formally be part of the *D* term, since any expected utility from adding to a mandate is independent of the given electoral outcome. Note that such explanations presumably remain subject to the alleged paradox of turnout, as individuals could reason that their one vote would make no appreciable difference in the value of any political mandate.

2009, 273). Morris Fiorina (1976, 395) in fact adds an additional term to the calculus to denote the expressive value of voting in line with one's party identification, and Aldrich (1997, 385) goes on to suggest that the value of this expressive utility is simply equal to the instrumental net benefit, or the value of  $B$  in the calculus.<sup>6</sup> Gábor Tóka (2009, 273) likewise disputes what he cites as the rational choice orthodoxy that vote choice is primarily instrumentally motivated, suggesting that expressive motives may dominate vote choice as much as the turnout decision. Tóka assumes *a priori* that turnout decisions must be purely expressive (due to a miniscule  $p$  value), and he therefore uses observations on turnout as a benchmark to measure motivations of vote choice (277). However, if  $p$  is interpreted as significantly higher (at least in relatively close elections), and thus turnout decisions might be instrumentally motivated (at least to some extent), it becomes more difficult to distinguish between instrumental and expressive motivations. Nevertheless, it seems clear that there may certainly be expressive components to the turnout decision, and in some cases (as in non-competitive elections), it may well be that expressive motivations come to predominate.

This idea that the motivation for voting may be primarily characterized by non-instrumental benefits has been seen to raise a difficult normative problem that goes beyond the question of whether a  $D$ -term solution of the turnout paradox is theoretically satisfying. In critiquing a dominantly expressive motivation for turning out to vote, Brennan and Buchanan (1984) were perhaps the first to introduce the analogy of voting to watching a sports competition. Despite knowing that one's vote can exert no meaningful effect whatsoever on the outcome, Brennan and Buchanan claim that citizens vote for their preferred candidates in much the same way that sports fans cheer for their favorite

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<sup>6</sup> The calculus thus effectively becomes:  $pB - C + D + B$ . Formally, this added expressive benefit is perhaps better modeled as part of the  $D$  term, but the salient point is that vote choice, which would seem to follow an instrumental motivation (represented by  $B$ ), can also be an expressive factor in the turnout decision.

teams (186). However, they argue that the absence of any direct concern for an instrumental effect on the outcome opens the way for “electoral irrationality of the most basic kind” (199). Brennan and Lomasky (1985, 204) expand on this normative problem, suggesting that expressive voting could lead citizens to vote for “morally unsavory” policies that they would not choose if they thought their vote might really matter. Brennan and Hamlin (1998, 166) further point out that expressive motivations provide more room for candidates’ “rhetorical or presentational skills” to influence vote choices, prompting the question of whether outcomes motivated by expressive considerations will ever “serve the interests of the citizens.” Jones and Dawson (2007, 108) more generally suggest that when voting is based on non-instrumental considerations, “appraisal of democratic processes proves far more difficult.”

These arguments again rely on the assumption that turnout can never be instrumentally motivated, due to the alleged paradox of turnout, and they also seem related to arguments that high information costs make well-reasoned voting extremely difficult, with the result that irrational preferences are likely to prevail in vote choices (e.g. Somin 1998, Caplan 2007). As discussed in previous chapters, both these assumptions may be unwarranted, but even without making them, there indeed does seem to be a need for a better-developed normative framework for understanding and evaluating non-instrumental motivations for turning out to vote. Keith Dowding has thus criticized the expressive *D*-term solution to the turnout paradox for failing to satisfy the “desire for deeper reasons” about why citizens vote or abstain (Dowding 2005, 453). However, other scholars studying turnout motivations have in fact offered explanations that provide deeper reasons for non-instrumental voting. Alexander Schuessler outlines the normative foundations for such reasons in his insightful theory of expressive motivations, which he associates with a phenomenology of “being” rather than “doing”

(Schuessler 2000, 90). Schuessler thus ties expressive voting to the construction of identity through the association of individuals within larger social groups (92). In contrast to Brennan and Buchanan's critical view bemoaning the irrationality of expressively-based decisions, Schuessler actually defends the prevalence of ambiguity and abstract symbolism in democratic discourse, indicating that such "multiplicity of meaning" is necessary to the development of shared cultural understanding (94).

Schuessler's insight into the social construction of identity through voting decisions may provide the foundations for another set of *D*-term solutions to the turnout paradox, which frame the decision to vote as consistent with a concept of "group rationality." Carole Uhlaner (1989) was among the first to formalize this approach in a decision-theoretic context, pointing out that even if one assumes that individual votes are never instrumentally effective, an increase in turnout among members of a sizable group could indeed have a pivotal effect on the outcome of a large election. Voting could thus be instrumentally rational from the perspective of group leaders, who might therefore provide group members with selective incentives in the form of expressive or consumption benefits in order to motivate their participation (Uhlaner 1989, 392). Rebecca Morton further elaborates on the group rationality approach, clarifying how this represents a *D*-term solution to the paradox, since the incentives provided by group leaders to motivate turnout are not directly dependent on the outcome of the election (Morton 1991, 761). In a game-theoretic context, Schram and van Winden explain how group members may be induced to vote by "producers of social pressure," in a model they describe as endogenizing the sense of civic duty represented by the *D* term (Schram and van Winden 1991, 596). Shachar and Nalebuff likewise detail a "pivotal leader" strategic model of turnout, which has group members responding to social pressure

without directly considering whether their individual votes will have any effect on the outcome (Shachar and Nalebuff 1999, 535).<sup>7</sup>

Digging deeper beyond these act-utilitarian approaches that rely on selective incentives and social pressure begins to unearth the broader importance of ethical motivations within the rational choice calculus. John Harsanyi explicitly makes this connection between ethics and rational choice when he declares that “moral behavior...is a special form of rational behavior” (Harsanyi 1977, 625; see also Harsanyi 1986, 83).<sup>8</sup> Harsanyi provides the formal foundations for a strategic/ethical model of voter turnout in an important paper on rule utilitarianism, in which he indicates that the voting paradox can be resolved by a “*rational commitment* to a comprehensive joint strategy” (Harsanyi 1980, 129, emphasis in original). Harsanyi thus explains how it can be perfectly rational to ask the Kantian-type question, “What would happen if people like me did not vote?” (130). Feddersen and Sandroni (2006a) derive a formal model of turnout based on Harsanyi’s rule utilitarian approach, with ethical agents receiving utility for taking the normatively “right” action, determined according to an optimizing rule of voting cost cut-offs based on the expected closeness of the election. Feddersen and Sandroni also elaborate the theory behind their rule utilitarian model, emphasizing the need for consistent preferences among group members and strong group identity in order to motivate optimal levels of turnout (Feddersen and Sandroni 2006b, 8). Coate and Conlin (2004) apply this model to empirical turnout data, finding that the rule utilitarian

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<sup>7</sup> Dowding (2005, 445) classifies social pressure to vote as a type of *C*-term solution, in that it increases the costs of *not* voting. This is formally no different from a *D*-term classification, but conceptually, social pressure is perhaps better framed positively as a benefit, rather than negatively as a cost.

<sup>8</sup> Riker and Ordeshook may be alluding to a similar notion when they state: “[T]he paradox of participation is solved by the construction of an ideology of obligation” (Riker and Ordeshook 1973, 60). Even Downs, at least in his later work, appears to lend support to an ethical approach in his discussion of the two basic social values of democracy, one of which is the “duty of mutual cooperation with others” (Downs 1991, 156).

approach provides more explanatory power than a basic model of expressive voting. Justin Valasek (2012) further extends this strategic model to provide a welfare analysis of different electoral rules aimed at increasing turnout. Overall, these ethical approaches to the voting paradox provide a much richer perspective on the *D* term than that suggested by the initial critics of expressive motivation in their comparison of voting to simply cheering on a sports team.

Yet some go even further to argue that the sense of obligation represented by *D* is not even coherently represented by the conventional calculus, at least among those citizens who acknowledge a strongly felt sense of a civic duty to vote. Blais and Achen accordingly suggest that the duty to vote is not properly viewed as satisfying a consumption or expressive benefit that must be weighed against other factors, such as instrumental benefits and costs, because for a “morally motivated voter... there is no real choice if she wants to do what is right” (Blais and Achen 2010, 5). They thus model the turnout decision through what they term a lexicographic model, in which the costs and instrumental benefits of voting are considered only after giving prior consideration to ethically-based motivations associated with a sense of duty (6).<sup>9</sup> One might indeed go even further and insist that a deep sense of duty transcends any utilitarian calculus. Along these lines, Yanis Varoufakis (1991) explains the distinction between the approaches of

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<sup>9</sup> Blais and Achen’s lexicographic model is similar in some ways to Ruth Chang’s “hierarchical voluntarism” discussed in Chapter 2 (Section 3c). There might appear to be some conflict between the two approaches, as Chang’s theory was said to imply that instrumental benefits—as *given* reasons—should take precedence over non-instrumental, *voluntaristic* motivations, while in Blais and Achen’s model non-instrumental motivations are considered first. Notably, Blais and Achen’s model is not normative but purely empirical, and they make no arguments about its moral correctness (Blais and Achen 2010, 5, n. 9). Note also that Blais and Achen define instrumental benefits (which they measure through reported strength of preference for a certain outcome) as “non-ethical,” but the application of Chang’s theory in the previous chapter suggests that instrumental benefits can in fact have important ethical implications. Nevertheless, Blais and Achen are presumably right that a strong sense of a “higher” duty (whether to vote or to abstain) could be an ethical motivation that comes closer to what Chang would describe as a given reason, rather than a voluntaristic (or expressive) motivation.

David Hume and Immanuel Kant to the understanding of duty as a normative motivation: The Humean approach sees duty as just another internal motivation that—like all preferences—can be reduced to an assessment of expected utility, while the Kantian approach sees duty as an external reason that exists separate from and above any utilitarian expectations, a motivation that may reach beyond conventional notions of rationality. The Humean thus sees norms as “relevant only to the extent that individuals derive utility from respecting them” (Varoufakis 1991, 253), whereas under a Kantian approach, “duty bears a weight which must be qualitatively different to that of selfish interest” (254).

Given the enormity of the potential motivations for the decision to vote represented by *D*, this aspect of the calculus emerges as the potential source of a powerful policy lever in efforts to increase electoral participation. It is thus natural to wonder whether anything can be done to increase the sense of a civic duty to vote, or otherwise to introduce non-instrumental incentives for participation. This leads to legal and policy questions of whether a civic duty of voting should be institutionalized via election laws and administrative procedures. In broadest terms, the question is one of fundamental constitutional design: Should participation in mass democratic elections be framed as a purely voluntary act, or as a civic obligation? (Levinson 2012, 116-117; see also Birch 2009, 14).

### **3) THE CONSTITUTIONAL DUTY TO VOTE AND COMPULSORY VOTING**

The question of whether voting in elections should be conceived simply as a formal right of the democratic citizenry, or whether it should be seen as a civic duty as well, is an important question of constitutional design with significant implications for

election law and policy, as will be discussed further below. Moreover, this is an issue that is—or arguably should be—of great importance in political theory and ethics, not to mention being a matter of practical political concern. There is essentially universal agreement in established democracies that electoral participation should be an enforceable civil right as a matter of both theory and practice,<sup>10</sup> but there is far less consensus on whether the decision to vote should be left as a purely voluntary matter, or whether participation should be formally considered—and perhaps also implemented and enforced—as a general obligation of all (or almost all) democratic citizens. In political theory, the question of a duty to vote has generally received fairly limited attention, although it does seem to be generating increased scholarly discussion and debate over recent years. Participatory democratic theorists (e.g. Pateman 1970) and those in the civic republican and communitarian traditions (e.g. Barber 1984; Bellah 1995), as well as more recent deliberative theorists (Fishkin 2009), have all tended to focus on forms of participation and civic engagement that are more intensive than voting, which may be understandable given their critical view of representative democratic forms in general. More traditionally liberal democratic theorists, on the other hand, have commonly assumed that compulsory voting laws violate liberal norms of non-coercion and self-expression, often claiming that the right to vote implies a concomitant right to abstain from voting as well (e.g. Abraham 1955, 6-7).

Although the notion of a duty to participate in elections may initially seem foreign to American political development, the pre-independence colonies of Virginia, Maryland, and Delaware, as well as the state of Georgia in its first constitution in 1777, all had

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<sup>10</sup> There are of course many disputes and differences of opinion, however, regarding the particulars of how voting rights should be protected and enforced.



compulsory voting laws with fines for non-voting (see Birch 2009, 20).<sup>11</sup> Although the practice appears mostly absent during the early history of the United States, proposals to make voting mandatory had a resurgence in the late nineteenth and early twentieth centuries, with constitutional amendments on this matter passed in North Dakota (1897), Massachusetts (1918), and Oregon (1919), although the Oregon amendment was rejected at a subsequent referendum, and the other amendments were never implemented or enforced (see Abraham 1952, 346-347; Birch 2009, 20-21;).<sup>12</sup> Compulsory voting was also enforced for a short time beginning in 1889 in the municipality of Kansas City until it was declared unconstitutional under the Missouri state constitution (see Abraham 1952, 347).<sup>13</sup> Thus, the American tradition of electoral participation as a voluntary choice and not a civic duty, which might seem like a deeply entrenched part of American political culture (see e.g. Hasen 1996, 2174), was clearly not a matter that has been always taken for granted.

Comparatively, the constitutional duty to vote and compulsory voting practices have been more common. In Europe, virtually everywhere other than Great Britain and the Scandinavian states has had some experience with compulsory voting during the twentieth century (Birch 2009, 23-24; Malkopoulou 2015, 5-6).<sup>14</sup> The civic obligation of

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<sup>11</sup> The Plymouth Colony itself instituted a fine for non-participation in 1636, as did several towns in Massachusetts in following years. As Birch indicates, the American colonies may in fact have originated the very practice of compulsory voting in modern democratic elections (Birch 2009, 20). Abraham (1952, 346) also mentions the existence of compulsory voting in the pre-independence colony of North Carolina.

<sup>12</sup> According to Abraham, there were 57 compulsory voting bills introduced in nine different state legislatures between 1888 and 1952 (Abraham 1952, 346-7; see also Keyssar 2000, 128).

<sup>13</sup> The Missouri Supreme Court in *Kansas City v. Whipple* 136 Mo. 475 (1896) held that a fine for failure to vote amounted to “partial and discriminatory taxation” and an “invasion of [the] sovereign right of suffrage” (484).

<sup>14</sup> Compulsory voting laws are reportedly still enforced with some type of sanction in Belgium, Lichtenstein, Luxembourg, and the canton of Schaffhausen in Switzerland, while the constitutional duty to vote has remained formally unenforced in Greece since 2000, and in Italy since 1993 (IDEA 2016; see Constitution of Greece 1975 (amended to 2008), Article 51; Constitution of Italy 1947 (amended through 2012), Article 48 (constitutions available at [ConstituteProject.org](http://ConstituteProject.org)). Although Portugal is not generally listed among countries with compulsory voting, Article 49 of its current constitution provides that voting is

electoral participation is even more prevalent throughout South and Central America, where a duty to vote was included in almost all constitutions enacted beginning in the late 1900s through the mid-twentieth century (Birch 2009, 24-25). In fact, every Latin American nation existing today appears to have recognized a civic duty to vote at some point in its history, and only Chile, Cuba, Nicaragua, and Venezuela appear to lack any formal recognition of such a duty at the present time.<sup>15</sup> The few countries in Asia and the Pacific that have recognized a duty to vote are generally not well-developed democracies;<sup>16</sup> however, the foremost example of an established democracy with a compulsory voting regime is Australia, where legal enforcement of the duty to vote began in 1924 and continues to this day (Birch 2009, 32). A 2004 study of established democracies worldwide found that just over one-fourth had some form of compulsory voting laws (Massicotte et al. 2004, 35), although that figure today is probably at most

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a civic duty (Constitution of Portugal 1976 (amended to 2005)). Other major European states that practiced compulsory voting in the twentieth century include the Netherlands (until 1967), other cantons in Switzerland (until 1974), Austria (gradually abolished between 1982-2004), and Spain (1907-1923) (IDEA 2016, Birch 2009, 22-23). In the near-European region, both Cyprus and Turkey are currently reported as practicing compulsory voting with some enforcement (IDEA 2016); but see Malkopoulou (2015, 4, 6) reporting an absence of current enforcement in these two countries.

<sup>15</sup> Chile moved in 2012 from a system of compulsory voting with voluntary registration to voluntary voting with automatic registration (Barnes and Rangel 2014, 573). Nicaragua recognized a constitutional duty to vote until the 1979 Sandinista revolution, as did Cuba until the revolution of 1959 (Birch 2009, 24). Venezuela removed legal sanctions for abstention in 1993 and constitutionally abolished the duty to vote in 1999 (Carey and Horiuchi 2017, 7). Although neither Colombia nor El Salvador is listed as having compulsory voting by IDEA (2016) or Barnes and Rangel (2014, 575), Article 258 of Colombia's current constitution does state that voting is a civic duty (Constitution of Colombia 1991 (amended to 2013)), as does Article 73 of El Salvador's constitution (Constitution of El Salvador 1983 (amended to 2014)). Fornos et al. (2004, 936) include El Salvador as having a duty to vote, but not Colombia. The only countries in all of Central and South America that appear never to have formally recognized a duty to vote are Belize, Guyana, and Suriname—countries that are not generally identified as Latin American (but rather as Anglophone and Dutch).

<sup>16</sup> The duty to vote is currently recognized in Singapore, Thailand, and Laos, as well as in the Pacific island of Nauru. In Fiji, compulsory voting was practiced between 1992 and 2004, and the duty to vote was formally abolished in 2014 (IDEA 2016; Birch 2009, 36). The few reported examples of compulsory voting in Africa include Egypt, where the duty to vote—although unenforced—apparently continues to this day, as well as Gabon, and what is now the Democratic Republic of Congo, both of which briefly instituted compulsory voting after their independence in the early 1960s (Birch 2009, 26; IDEA 2016).

about 20 percent.<sup>17</sup> Thus, while construing electoral participation as a civic obligation as well as a civil right may be currently characterized as a minority practice among established democracies, it is by no means a radical or fringe view concerning the structure of the franchise, and it clearly has a strong historical provenance.

It is important to emphasize that the practice of what is usually called compulsory voting—or sometimes mandatory, or obligatory voting—is extremely varied empirically, reflecting a wide range of different approaches to implementation and enforcement of the duty to vote. The institution of compulsory voting should thus be broadly understood to encompass a spectrum of approaches, ranging from a constitutional exhortation accompanied by no attempt at legal enforcement, to a comprehensive administrative system for tracking all nonvoters and implementing sanctions for unexcused abstention (see IDEA 2016). In Australia, for example, both registration (or “enrollment”) and voting are mandated by law for all citizens aged 18 and over, with only limited exceptions for those deemed mentally incompetent, certain convicted criminals, and some citizens outside the mainland (AEC 2014). Following each election, the Australian Electoral Commission compiles a list of all apparent nonvoters and sends to each a notice that demands either an explanation of the individual’s excuse for failing to vote, or payment of 20 Australian Dollars.<sup>18</sup> A representative of the Commission reviews the excuses provided by nonvoters to determine whether they constitute “valid and sufficient reasons” for failing to vote, and provides another opportunity to pay the fine for all those

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<sup>17</sup> The Massicotte et al. study, which includes all countries with a Freedom House score of 1 or 2 (on a scale of 1 to 7) in political rights for 1996, found compulsory voting in 18 out of 63 countries (Massicotte et al. 2004, 11); however, the study excludes the United States and Switzerland (for methodological reasons), so the figure is really 18 out of 65, or about 28 percent. Of the 85 countries with a Freedom House score of 1 or 2 in political rights for 2015, 15 countries (including Switzerland) currently appear to recognize a civic duty to vote in some form, or about 18 percent of the total (see Freedom House 2017; IDEA 2016). If countries with a score of 3 in political rights are also included, the proportion is about 19 percent.

<sup>18</sup> \$20 AUD is equivalent to about \$16 USD at the time of this writing.

whose excuses fail to meet this legal threshold.<sup>19</sup> A citizen who fails to pay the fine at this point may be prosecuted for an offense with a maximum penalty of \$180 AUD, plus court costs. Failure to pay the fine imposed after conviction may result in a short jail sentence, although such cases appear to be relatively rare (AEC 2014).<sup>20</sup>

At the other extreme, to the extent that a country like Greece can still be included in lists of countries that practice compulsory voting today, it is simply by virtue of the constitutional provision indicating that voting is a civic duty, for since the year 2000 there has reportedly been no enforcement of that duty (IDEA 2016). In other places where a duty to vote is mentioned in the constitution there may be no formal administrative enforcement, but abstention can still be associated with informal sanctions, as appears to have been the case in Italy prior to 1993.<sup>21</sup> Enforcement of compulsory voting can also occur by way of sanctions other than a monetary fine, including the possibility of bans on public employment or obtaining certain government services, as

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<sup>19</sup> The AEC does not define exactly what constitutes a “valid and sufficient” reason for abstaining, but rather states that the administrative decision should be based on “the merits of each individual case, in accordance with the law as previously interpreted by the courts” (AEC 2014). It then cites a statute indicating that a perceived religious duty to abstain is a valid and sufficient reason, and it lists several court decisions holding that sickness, accident, or emergency are generally good excuses, but that political objections to the government or lack of a preference regarding any of the candidates on the ballot are not considered valid and sufficient reasons for abstaining.

<sup>20</sup> In the 1993 national elections, for example, at least 43 nonvoters were reportedly sentenced to one or two days in jail (Bennett 2008, 7). Out of a total of 11,385,638 registered voters in those elections, the Electoral Commission investigated 490,230 cases of nonvoting, of which 462,588 appear to have provided a valid excuse, 23,230 paid the \$20 fine, and 4,412 reportedly went to court (Mackerras and McAllister 1999, 224). In the 2004 elections, there were 458,952 notices issued, with 52,796 fines of \$20 paid by nonvoters (a number indicated as significantly higher than previous years due to introduction of an online payment system), and final convictions entered in at least 22 cases (Bennett 2008, 27-28). It is unclear how many of the 22 convictions in 2004 resulted in jail sentences; the Electoral Commission indicates that court orders of community service or seizure of property are other options in cases of conviction (AEC 2014). Lisa Hill indicates that imposition of a jail sentence for non-payment of fines “no longer seems to happen” (Hill 2014, 115).

<sup>21</sup> According to IDEA (2016), the sanctions for abstention in Italy were termed “innocuous,” and might have included the possibility of difficulty in finding daycare for a child. Prior to 1993, Italian law also required lists of nonvoters to be publicly posted in municipal buildings (Birch 2009, 8). Mexico is another country where reportedly there could be “arbitrary or social sanctions” associated with abstention (IDEA 2016).

appears to be the case in some Latin American countries, including Argentina, Bolivia, and Brazil (Birch 2009, 9). In Belgium, habitual shirkers of the duty to vote can actually be deprived of their associated civil right, as they may be removed from the electoral register for a period of ten years after failing to vote in four national elections (Birch 2009, 8). Furthermore, in addition to the various types of negative sanctions, some governments may provide positive incentives for fulfilling the duty to vote, such as in Colombia, where voters by law receive preference over any equally qualified abstainers for acceptance at universities, government employment, and other state benefit programs, in addition to discounts on university tuition and fees for various government services.<sup>22</sup> Finally, beyond the wide variation in the content or existence of sanctions associated with the duty to vote, there may also be significant differences in the level of enforcement of any sanctions, either due to a deliberate decision in favor of lax enforcement—as reportedly is the case in Belgium—or due to deficiencies in administrative capacity, as appears to be the case in many Latin American countries (Birch 2009, 6).

This extensive variation in the institutions of compulsory voting makes it difficult to empirically evaluate any causal effects associated with establishing voting as a civic duty in addition to a civil right. Studies that analyze cross-national variation generally seek to differentiate between countries with strong, weak, or no enforcement of the duty to vote (e.g. Chong and Olivera 2008), and they may also account for differences in the severity of any applied sanctions (e.g. Panagopoulos 2008); however, this modeling approach may still fail to fully capture the wide range of institutional variation, and the

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<sup>22</sup> Colombian Law 403 of 1997, Article 2. Article 4 of the law allows for nonvoters to receive the same incentives if they demonstrate to authorities that their abstention was excusable due to *force majeure* or accident. Interestingly, the Constitutional Court of Colombia declared the provision of incentives to voters unconstitutional with respect to voting in constitutional referendums or any other elections having a minimum turnout requirement, reasoning that in such cases abstention could be viewed as instrumentally effective, and it must therefore be a legally protected right with no adverse consequences (Judgment C-041 of 2004).

data sources employed do not necessarily allow for a more fine-grained analysis.<sup>23</sup> Other studies look at changes or differences in compulsory voting rules within a country (e.g. Hirczy 1994; Bechtel et al. 2015; Carey and Houichi 2017), but these analyses may lack external validity when applied to other legal/administrative contexts. Moreover, beyond these methodological problems, the substantive results of these empirical analyses are somewhat mixed, and it is therefore difficult to draw general conclusions based on the literature as it stands to date.

The strongest finding—albeit one that is probably unsurprising—is that strict enforcement of compulsory voting, particularly when accompanied by relatively severe sanctions, tends to significantly increase voter turnout (Panagopoulos 2008; Birch 2009, 93-94; Singh 2011; Quintelier et al. 2011).<sup>24</sup> This finding is confirmed by analyzing the turnout effects of geographic and historical variation in compulsory voting rules within certain countries (Hirczy 1994), as well as by counterfactual analysis of the hypothesized effect of abolishing compulsory voting in Australia (Jackman 1999; Louth and Hill 2005). Sarah Birch in fact concludes that compulsory voting is the strongest institutional variable impacting turnout, with an effect that ranges anywhere between six and twenty percentage points (Birch 2009, 91).<sup>25</sup> However, there are of course many other factors that contribute to determining turnout levels, including socioeconomic, political, and

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<sup>23</sup> Most of the cross-national analyses rely on data provided by IDEA (2016), which provides only general information on compulsory voting in countries around the world and does not provide detailed sources for its data collection.

<sup>24</sup> Norris (2004, 169) finds that compulsory voting increases turnout in established democracies, but that it might actually be associated with decreased turnout in other political systems; however, several other studies have found that compulsory voting increases turnout generally in all countries (Jackman 1987, 415; Blais 2000, 27; Fornos et al. 2004, 927; Geys 2006a, 652; Karp and Banducci 2008, 329; but see Yeret 1995). Quintelier et al. (2011) find that compulsory voting is less effective at increasing turnout among younger citizens. Jaitman (2013) finds that the increase in turnout under compulsory voting in Argentina is twice as great among unskilled as opposed to skilled workers.

<sup>25</sup> Birch also finds, however, that a constitutional duty to vote without any accompanying administrative sanctions has no measurable effect on turnout (Birch 2009, 94).

other institutional variables (see e.g. Geys 2006a), and it is clear that countries can have high turnout in national elections without compulsory voting, as is the case in Malta and (to a lesser extent) the Scandinavian countries (see Hirczy 1994; 1995). In addition, social norms of voting may exist separate from any legal standards (see Hasen 1996), and general factors such as the political salience of elections may also be important in determining turnout levels (Franklin 1999).

Findings are somewhat murkier with respect to other potential effects of compulsory voting. In a counterfactual study of how abolishing compulsory voting would affect the composition of the electorate in Belgium, Hooghe and Pelleriaux (1998) find that socioeconomic inequality in turnout would significantly increase, a finding confirmed by De Winter and Ackaert (1998). Likewise, Zachary Elkins (2000) finds in a study of Brazil that compulsory voting appears to at least modestly increase the electoral participation of conventionally underrepresented demographic groups, and Laura Jaitman (2013) finds even stronger effects in Argentina. These general findings are confirmed in a cross-national analysis by Aina Gallego, but she finds that the reduction in turnout inequality under compulsory voting is an indirect result of turnout levels moving closer toward universal participation, rather than a direct effect of increasing the propensity to vote within lower socioeconomic demographics (Gallego 2010, 246).<sup>26</sup> On the other hand, Cepaluni and Hidalgo's (2016) study of compulsory voting in Brazil finds that the practice actually tends to *increase* inequality in turnout, which they argue is a result of non-monetary sanctions for abstention being more effectively enforced against middle and upper class citizens. Regarding economic effects, Crain and Leonard (1993) find an overall reduction in government spending in countries with compulsory voting, which

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<sup>26</sup> But see Singh (2015), finding that turnout inequality is reduced under compulsory voting specifically because the propensity to vote increases among those who would otherwise be less likely to participate.

they theorize is tied to a reduction in the influence of special interest groups under these voting rules. O'Toole and Strobl (1995) question this result on methodological grounds, and they instead find that government expenditures on health as well as housing and transfer payments appear higher under compulsory voting rules, although they confirm that expenditures on defense and economic services are indeed lower. Chong and Olivera (2008) find that enforcement of compulsory voting reduces levels of income inequality cross-nationally, and Carey and Horiuchi (2016) confirm this finding in a study of Venezuela; however, Birch initially finds no such cross-national effect, although she does confirm the finding of reduced income inequality when considering only countries in Latin America and Western Europe (Birch 2009, 130-131).

The question of the potential consequences of compulsory voting for the political system is closely tied to the complex issue of whether and how electoral outcomes might change under higher voter turnout, an empirical question that has generated substantial debate, particularly with regard to elections in the United States.<sup>27</sup> The relatively few studies that have looked more specifically for political effects associated with the institutions of compulsory voting have also generated mixed results. In a study of political outcomes in Australia, Mackerras and McAllister (1999) find that compulsory voting decreases support for right-wing parties while increasing support for the political left and for minor parties in general. Jensen and Spoon (2011) confirm and explain the increased support for minor parties under compulsory voting through a cross-national analysis showing that compulsory voting laws spread out the distribution of vote choice, leading to a greater number of political parties represented in legislatures and a wider

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<sup>27</sup> See Chapter 3, Section 2 for a discussion of this issue.



ideological range in governments.<sup>28</sup> Similarly, Bechtel et al. (2015) confirm an increase in support for “leftist” policies in their study of compulsory versus voluntary voting in Swiss referendums. However, Birch finds no increase in support for either small or left-leaning parties in her cross-national analysis, and she finds that enforcement of compulsory voting in Belgium actually appears to increase support for the political right (Birch 2009, 123-128).<sup>29</sup>

Birch finds that compulsory voting tends to significantly increase perceptions of democratic legitimacy—at least outside of Latin America, where satisfaction with democracy is in general relatively low—and interestingly, she finds that this effect is not dependent upon the enforcement of sanctions for nonvoting (Birch 2009, 113).<sup>30</sup> Her analysis also indicates that enforcement of compulsory voting is associated with at least a slight increase in the likelihood of political participation more generally, with a more significant increase in the likelihood of engaging in protests or demonstrations (Birch 2009, 70-72).<sup>31</sup> On the other hand, Birch finds that enforced compulsory voting is associated with decreased perceptions of political efficacy, which she indicates could provide evidence of increased levels of “democratic disaffection” (Birch 2009, 68). Krister Lundell (2012) generally confirms Birch’s finding that even unsanctioned compulsory voting tends to increase reported levels of trust in government, but Lundell also finds that the duty to vote—again whether enforced or not—has an overall negative

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<sup>28</sup> Jensen and Spoon emphasize that their findings regarding the effects of compulsory voting are distinct from the effects of increasing turnout alone, which leads them to theorize that the institution of compulsory voting is qualitatively different from high turnout achieved by other means (Jensen and Spoon 2011, 708). They also note that their findings on the effects of compulsory voting are strongest when the duty to vote is mentioned in the constitution (709).

<sup>29</sup> Birch also finds that sanctioned compulsory voting results in lower levels of perceived governmental corruption (Birch 2009, 132).

<sup>30</sup> Birch finds weaker evidence of a positive effect of compulsory voting on perceptions of the quality of democratic representation (Birch 2009, 114).

<sup>31</sup> See also Yates (2008), finding that compulsory voting increases the propensity to engage in non-electoral forms of democratic participation.

effect on engagement in other types of democratic participation, an effect she attributes to “societal disillusion and an antipathetic attitude” engendered by this institution (Lundell 2012, 226). Accordingly, Singh (2016) finds that compulsory voting—particularly when enforced—is associated with increases in anti-government attitudes and reports of dissatisfaction with the democratic system.<sup>32</sup>

Studies of the effects of compulsory voting on the acquisition and use of political information have also generated mixed results. Jill Sheppard’s cross-national study finds that enforcing a duty to vote leads to noticeable increases in the political knowledge levels of citizens (Sheppard 2015), and Gordon and Segura likewise find a significant positive effect on political sophistication in countries with compulsory voting (Gordon and Segura 1997, 140). Studies by Caitlin Milazzo also confirm that the duty to vote can make citizens more likely to engage in political discussion, both cross-nationally (2008), and in Swiss national elections (2009). On the other hand, Selb and Lachat’s (2009) study of Belgian elections finds that compulsory voting induces unmotivated voters to make choices that are more likely to be inconsistent with their expressed preferences, implying a clear lack of informational sophistication. Similarly, an experimental study by Loewen et al. (2008) found no increase in information acquisition among Canadian university students who were required to vote in a provincial election in order to receive payment for participation in the study. Singh et al. (2016) find comparable results in an Australian experiment in which individuals who reported they would not vote unless compelled to do so are generally less likely to seek out political information. Birch also finds that

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<sup>32</sup> According to Singh, “forced participation inflates the tendency of those with negative orientations towards democracy to see the democratic system as illegitimate, and to be dissatisfied with democracy” (Singh 2016, 1). This is also tied to the observation that compulsory voting leads to a greater number of invalid ballots (Singh 2017). However, a study of several Australian elections by Hill and Young concludes that the “vast majority” of invalid ballots—known in Australia as “informal” votes—are unintentional results of the complexity of the preferential electoral system, rather than expressions of dissatisfaction or protest (Hill and Young 2007, 521; see also Mackerras and McAllister 1999, 226).

compulsory voting has no significant effect on either acquisition of information or on the propensity to engage in political discussion (Birch 2009, 66-69). However, an experimental study by Victoria Shineman (2016) found that providing a financial incentive for voting in a San Francisco municipal election did in fact lead subjects to become more politically informed, and Shineman's (2012b) comparative study of Austrian provinces likewise concludes that compulsory voting increases the propensity to acquire political information.

The issue of information is also prominent in the mixed findings of game theoretic analyses of compulsory versus voluntary voting. Some of these studies assume the existence of an objectively correct decision corresponding with some "true" state of the world, and thus voters who are uninformed about this state of the world should strategically abstain from voting in order to allow informed voters to determine the outcome (Feddersen and Pesendorfer 1996).<sup>33</sup> Thus, voluntary voting may be claimed as superior to compulsory voting, as the majority decision is more likely to reflect the "correct" outcome when abstention is allowed (Krishna and Morgan 2012). Similarly, Jackee and Sun (2006) show that random choices by disinterested voters under compulsory voting creates uncertainty regarding the electoral outcome and may prevent that outcome from accurately reflecting the preference of the majority. However, the assumption of an objectively correct decision based upon a true state of the world, often called an assumption of "common values" (e.g. Krishna and Morgan 2012, 2086), is surely open to doubt in the context of political decision-making. Borgers (2004)

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<sup>33</sup> See also Austen-Smith and Banks (1996), showing that if abstention is not allowed, it is theoretically irrational for all voters to vote "sincerely" in accordance with their beliefs about the true state of the world. Also see Bhattacharya et al. (2014), confirming this theory in an experimental study comparing compulsory versus voluntary voting rules. But see Shineman (2012a) for a decision-theoretic model showing that compulsory rules as applied in practice tend to increase informed voting consistent with the true state of the world, a result that she generally confirms experimentally.

abandons this assumption in favor of a “private values” model and argues that voluntary voting is still superior to compulsory voting, but his analysis relies on the conventional rational choice expectation that individuals will not participate unless they have a substantial probability of being pivotal to the outcome, and he thus admits that his model cannot account for the behavior of voters in large elections (Borgers 2004, 57). In fact, in a private values model of a large electorate, Krasa and Polborn (2009) show that compulsory voting with fines for abstention actually makes it more likely that the outcome will accurately reflect the majority preference.<sup>34</sup>

In sum, although the duty to vote and compulsory voting laws are fairly common, there is a clear lack of consensus regarding most of the empirical effects of these institutions. It may be that more definitive causal findings will never be realized due to the relatively small universe of cases available for analysis and the wide variation in administrative implementations of the duty to vote, in addition to the difficulty in controlling for confounding variables and proving external validity given the complexity of sociopolitical processes in different countries. The challenges to formal models of compulsory versus voluntary voting are also apparent, but the prominence of informational assumptions in these studies is notable, as it is apparent that fundamental ideas about the meaning and function of voting in modern democratic theory are extremely important for assessing these institutions. The bigger normative questions associated with the duty to vote and compulsory voting seem to have flown somewhat under the radar of conventional scholarship in political theory, but more recently there has emerged a fairly rich literature addressing these questions, with some interesting and enlightening debates. A closer look at these debates can assist in achieving a better

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<sup>34</sup> See also Ghosal and Lockwood (2009), who model the voting decision as a mixture between private and common values and find that compulsory voting may be superior to voluntary voting when the weight attributed to the common values component is higher.

understanding of these institutions and in formulating new arguments about whether electoral participation in a liberal democracy should be construed and administered as a general civic duty or as a voluntary choice of democratic citizens.

#### **4) SHOULD THERE BE A CONSTITUTIONAL CIVIC DUTY TO VOTE?**

As discussed in the previous section, formal recognition of a constitutional duty to vote does not necessary imply the existence of enforced compulsory voting laws, and there indeed may be other important policy implications for voting rules and procedures that follow from recognizing a duty to vote, as will be discussed further below. However, the broad normative question of whether there is—or should be—such a duty in the first place must be addressed.

Conventional scholarly opinion in political theory has generally expressed skepticism concerning both the duty to vote and the practice of compulsory voting. Early treatments by Henry Abraham (1952) and H. B. Mayo (1959) argue strenuously against compulsory voting, citing various reasons why electoral participation by all citizens would be undesirable. However, it must be acknowledged that the intellectual environment surrounding voting—at least in the United States—was somewhat different in the days prior to the civil rights era, when this country arguably suffered from major democratic deficits given the denial of effective voting rights to many of its citizens. Accordingly, Abraham’s first argument against compulsory voting is that the franchise is not even a civil right, but rather only a “privilege, bestowed by the government” (Abraham 1952, 347),<sup>35</sup> an opinion that presumably few would adhere to today. Although

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<sup>35</sup> In Wesley Hohfeld’s classic formulation of legal relations, “a privilege is the opposite of a duty” (Hohfeld 1913, 32); thus, if voting is a privilege rather than a right, there is by definition no duty to vote (see Hill 2014, 169).

it remains true that the U.S. Constitution does not explicitly confer the right to vote, and the constitutional status of that right is indeed somewhat ambiguous, in practice it is fairly clear that the right to vote is considered “fundamental” in American jurisprudence, and that it cannot be denied, at least to adult citizens, barring a lawful reason such as criminal conduct or mental incapacity.<sup>36</sup>

Early arguments also focus on the argument that a right to abstain from voting is required for free exercise of the right to vote (Abraham 1952, 348), an argument that echoes the 1896 opinion of the Missouri Supreme Court, which stated, “How can a citizen be said to enjoy *the free* exercise of the right of suffrage who is constrained to such exercise, whether he will or not, by a penalty?”<sup>37</sup> Some have thus suggested that the establishment of voting as a civic duty is inconsistent with liberal democratic norms and practices, and even that the duty to vote has totalitarian connotations (Abraham 1955, 33; Jones 1954, 25). While the notion that compulsory voting is fundamentally undemocratic seems largely untenable given the examples of established democracies employing this practice, nevertheless, the argument that a duty to vote is somehow illiberal does continue to resonate today. Along these lines, some of the more recent normative scholarship argues that the right to vote in a liberal democracy must also include a right to abstain from voting (Karlan 1994, 1458; Blomberg 1995; Katz 1997, 244; Hanna 2009; Lever 2010). Jeffrey Blomberg goes so far as to argue that the right to abstain “logically

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<sup>36</sup> The Constitution does not explicitly grant a right to vote, although it prohibits some discriminatory voting practices (see Gerken 2014, 11). The U.S. Supreme Court first delineated the textual origin of the right to vote in *Baker v. Carr* 369 U.S. 186 (1962), in which the Court interpreted this right as implied by the Equal Protection Clause of the Fourteenth Amendment (see Douglas 2014, 97). Subsequent decisions and the passage of the Voting Rights Act of 1965, along with its later amendments, further strengthened the status of voting as a fundamental civil right. Nevertheless, there remains doctrinal confusion about the constitutional status of the right to vote, and particularly whether that right is actually treated as fundamental by judicial decisions (see Gardner 1997, 894; Douglas 2008, 145). This confusion and uncertainty can be seen as reflected in the ongoing disputes regarding the form and content of voting rights protections in this country.

<sup>37</sup> *Kansas City v. Whipple* 136 Mo. 475, 484 (1896) (emphasis in original).

follows” from the right to vote (Blomberg 1995, 1020; see also Ciccone 2002, 347–348).<sup>38</sup> However, there does not appear to be any logical contradiction in formally conceptualizing voting as both a right and a duty. Even some strong critics of compulsory voting admit this (Lever 2010, 905) and do not necessarily claim that a duty to vote is fundamentally inconsistent with liberal democratic norms (Brennan 2014, 13). While it is true that certain liberal rights—such as rights to religious expression or to bear arms—include an “inverse right,” or a right to waive the right, there are other rights that cannot be inverted or waived—such as rights to workplace safety or to a minimum wage (HLR 2007, 599; Hill 2014, 161). As Lisa Hill explains, there are many rights that encompass concurrent duties, which she terms *duty-rights*—such as the duty-right of a police officer to arrest a criminal, or the duty-right to repay one’s debts (Hill 2014, 170).

The reason some rights do not include an inverse right and cannot be waived is because rights may serve to protect not only the interests of individuals, but public interests as well (HLR 2007, 599; Hill 2014, 162). Defenders of the duty to vote as consistent with liberal democratic norms thus emphasize the collective—or structural—interest served by protection of voting rights, in addition to the individual interest in electoral participation. As Lisa Hill writes, “The right to vote is not just an individual right; it also exists for the purpose of constituting and perpetuating representative democracy, which is a collective benefit” (Hill 2014, 162; see also HLR 2007, 600; Lacroix 2007, 194; Engelen 2009, 221). Similarly, Heather Lardy rejects a right to

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<sup>38</sup> Blomberg argues that a right to abstain is constitutionally fundamental and should be subject to strict judicial scrutiny in the context of purging registration lists, a practice that he argues substantially burdens the right to abstain. Although Blomberg admits that this specific argument was rejected by a U.S. Circuit Court of Appeals in *Hoffman v. Maryland* 928 F.2d 646 (4<sup>th</sup> Cir. 1991), he explains that the *Hoffman* decision affirmed the lower court’s ruling regarding the existence of a right to abstain, but declined to rule on the level of constitutional protection required (Blomberg 1995, 1028). He also cites a Fifth Circuit case from 1974, and a 1972 decision of the Michigan Supreme Court, both holding that there is a right to abstain, as well as a 1993 Senate subcommittee report arguing for protection of the right not to vote (1020).

abstain as founded upon a mistaken assumption that the right to vote is associated primarily with protection of freedom or liberty in “the ‘negative’ sense” (Berlin 1969, 121), or the ability to remain free from government interference (Lardy 2004, 309; see also Schäfer 2011, 15). Instead, according to Lardy, the right to vote “is about ascribing democratic authority to electors; about declaring their formal equal standing as qualified participants” (Lardy 2004, 310). This recognition of the collective interest served by voting rights may also lead toward a civic republican argument in favor of the duty to vote, such as Phillip Pettit’s endorsement of compulsory voting on the basis that the purpose of elections is to provide for the common interest (Pettit 2000, 135; see also Pettit 2012, 201, n. 26). As Armin Schäfer explains, “republicans see liberty as inescapably bound up with sharing in self-government” (Schäfer 2011, 17); the duty to vote may accordingly be justified in the name of “realizing an inclusive democracy” (21).

Nevertheless, the right to free speech arguably also serves a public interest, yet it nevertheless does generally include an inverse right to remain silent (HLR 2004, 601). The question thus becomes, is voting a form of speech? To the extent that voting is comparable to speech, a right to abstain could be required, and citizens should not be forced to “speak” by voting (Karlan 1994, 1458). The U.S. Supreme Court has in fact held that voting does not legally qualify for the full protections of free speech under the First Amendment, because it is not primarily as an outlet for personal expression, but rather serves the more instrumental purpose of selecting government officials (HLR 2004, 601).<sup>39</sup> Furthermore, a compulsion to speak by voting would be a “viewpoint-

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<sup>39</sup> Hasen thus argues that a compulsory voting law should not be seen as violating the First Amendment—particularly if it allowed for abstention in practice, as discussed below (Hasen 1996, 2176, n. 163). The High Court of Australia appears never to have directly addressed this question, but at least one Australian scholar has argued that compulsory voting is an unconstitutional violation of the freedom of political communication (Gray 2012). A 1972 decision by the European Court of Human Rights held that Austria’s compulsory voting law did not infringe on protected freedoms of conscience and expression (ECHR 1972).



neutral” regulation of speech as long as one is not required to vote for any specific candidate or party, and such regulations are subject to a lower level of scrutiny under U.S. Supreme Court jurisprudence (HLR 2004, 602). Judicial doctrine on these matters is of course not necessarily dispositive of the normative question at hand, and as discussed in Section 2 above, there presumably are significant expressive motivations for voting.<sup>40</sup> Yet it must also be admitted that where the specific public interest at stake is considered important enough, even actual compulsion of speech can sometimes be acceptable in a liberal democracy—such as the power of courts to compel testimony (at least to the extent it is not self-incriminating). The question is thus whether the public interest served by a duty to vote is significant enough to override any individual right to remain silent by abstaining.

In addition to the significance of the collective interest weighing against any expressive right to remain silent, a further issue would be to inquire into the nature and degree of government coercion involved in a particular compulsory voting regime. This requires an assessment of how the law is implemented in practice, which is related to the legal question of whether the regulation of speech is “narrowly tailored” to achieve the public interest served by the law (see HLR 2004, 602). As indicated previously, there is a great deal of cross-national variation in enforcement of the constitutional duty to vote. Where this duty remains completely unenforced, there would of course be no violation of any right to remain silent; however, the fact is that even the strictest implementations of the duty to vote through strong enforcement of compulsory voting do allow citizens to abstain from voting as a practical matter. This is due to the now universal norm of the secret ballot in liberal democracies, which in practice means that one is always free to

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<sup>40</sup> See also the opinion of Justice Alito in *Nevada Commission of Ethics v. Carrigan* 131 S. Ct. 2343, 2354 (2011) stating, “Voting has an expressive component in and of itself.”

cast a blank ballot, or to intentionally spoil one's ballot (see Lijphart 1997, 2; Birch 2009, 2; Hill 2014, 116).<sup>41</sup> This practical feature of compulsory voting is generally recognized even by opponents of compulsory voting (e.g. Abraham 1952, 349; Sheehy 2002, 48-49; Saunders 2010, 74).<sup>42</sup> In fact, some proponents of the practice object to use of the term "compulsory voting," preferring instead "compulsory *turnout*," which is said to reflect the reality that what is actually required is only appearance at the polls (Keaney and Rogers 2006, 26; Machin 2011, 104).<sup>43</sup>

Others have suggested that providing a "no preference" or "none of the above" option on the ballot would ameliorate the coercive effect of compulsory voting (Feely 1974, 242; Orr 2002, 578; Elliot 2017, 658),<sup>44</sup> or that conscientious objector status could be provided to allow for principled abstention (Hill 2002a, 443; HLR 2004, 603). These practical options for allowing citizens to refrain from casting a valid vote serve to limit the actual coercion involved in compulsory voting and to minimize any violation of free

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<sup>41</sup> The European Court of Human Rights specifically referred to the option of casting a blank or invalid ballot in finding that Austria's compulsory voting law did not infringe on protected freedoms (ECHR 1972). Australian law appears to be somewhat unclear on this particular point, as strict interpretation of the relevant statutes could suggest that recording a valid vote may actually be required (see Hill 2002a, 448; Orr 1997, 292; Saunders 2010, 75). There does not seem to be any dispute about the fact that in practice Australian citizens are currently free to vote "informally" by casting invalid ballots; however, some have suggested that electronic voting could someday be designed in such a way as to require casting a formal vote while still preserving ballot secrecy (Chong et al. 2005, 13).

<sup>42</sup> Opponents of compulsory voting generally argue that a duty to simply turn out without voting is normatively problematic, or even incoherent (Saunders 2010, 75; Lever 2010, 911; see also John 2015, 432). Malkopoulou thus indicates that while casting a blank ballot may always be possible in practice, the question of whether in principle actual voting may be required remains a matter of fundamental debate (Malkopoulou 2015, 7). These arguments are addressed below in the discussion of limitations on the duty to vote (Section 4c).

<sup>43</sup> When compulsory voting was practiced in the Netherlands prior to 1970, it was in fact referred to as *opkomstplicht*, which translates as "obligatory attendance" (Hill 2014, 116). In the case of absentee or postal voting, compulsory turnout would presumably require actual submission of a ballot, but individuals are of course still free to cast a blank or spoiled ballot.

<sup>44</sup> The state of Nevada provides this ballot option, as apparently do the countries of France, Spain, Ukraine, some Latin American countries, and Russia before 2006 (see Damore et al. 2012, 895, n. 1). The option has also been available since 2013 in India, when the Indian Supreme Court mandated that it be included on all ballots (BBC 2013).

speech engendered by enforcement of a duty to vote. In fact, some argue that requiring citizens to proactively register their dissatisfaction in one of these ways would actually serve the interest of free speech by providing a better outlet for expression than abstention, which arguably does not clearly express anything, since it can be interpreted in so many different ways (Wertheimer 1975, 293; Lardy 2004, 318; Hill 2014, 144). Furthermore, compulsory voting laws do not preclude opportunities for expression through civil disobedience, accompanied of course by acceptance of the penalty for not voting (Thompson 2002, 36).<sup>45</sup> Nevertheless, protection of the right to free speech admittedly should require that individuals be free to choose their own modes of expression, and as one opponent of compulsory voting writes, even a “garbled” form of communication may still be deserving of protection (Gray 2012, 596). Even allowing for the options to spoil one’s ballot, to vote for none of the above, or to claim conscientious objector status, some will nevertheless continue to object to any enforcement regime connected to a civic duty to vote (Lardy 2004, 306). At root, the problem thus remains one of balancing any individual right to remain silent against the proposed public interest served by a civic duty to vote. But what exactly is the nature of that public interest, and how compelling is it? In order to answer this question, it is necessary to discuss the primary normative argument in support of compulsory voting.

#### **a) A Rawlsian Argument for the Duty to Vote**

Perhaps the most notable scholarly argument for establishing and enforcing a civic duty to vote was made by Arendt Lijphart in his 1996 presidential address to the American Political Science Association, entitled “Unequal Participation: Democracy’s

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<sup>45</sup> Hill provides some examples of this type of civil disobedience taking place in Australia, including public advocacy of informal voting and abstention (Hill 2002a, 439-440, 444-445). However, she indicates that a substantial majority of Australians do approve of compulsory voting (Hill 2010, 427).

Unresolved Dilemma” (Lijphart 1997). As reflected in that title, Lijphart’s primary motive in advocating compulsory voting in the United States is to reduce political inequality by increasing voter turnout and reducing the demographic bias of the electorate. Similarly, Lisa Hill—who may well be compulsory voting’s most vigorous and prolific contemporary defender—emphasizes the value of “substantive political equality” (Hill 2014, 112), and particularly equality in the composition of turnout (153), as the strongest motivation for enforcing a duty to vote.<sup>46</sup> However, actual applications of the value of equality are of course highly contested, and the meaning of political equality in practice can be difficult to pin down in contexts of its implementation in specific liberal democratic institutions (Beitz 1989, 3-4). It nevertheless remains an imperative question of constitutional design, as indicated, whether principles of equality should require that electoral participation be conceived only as a formal right of the democratic citizenry, or whether voting should also be framed as a generally applicable civic duty in a liberal democracy. Charles Beitz writes that “a theory of political equality should... explain what must be true of the terms of democratic participation if they can be said to reflect the equal public status of democratic citizens” (Beitz, 1989, 17).<sup>47</sup> According to Beitz, interpretations of equality in democratic institutions should explain why one design approach to setting the terms of participation yields more *fairness*—and correspondingly more *justice*—than another approach (17-19). The main argument presented here will thus be that framing electoral participation as a civic duty, in addition to a civil right, is

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<sup>46</sup> Lijphart and Hill also make other arguments for compulsory voting, but their primary arguments center on the issue of equality.

<sup>47</sup> Beitz does not address the question of compulsory versus voluntary voting, instead focusing his attention on the implications of principles of equality for electoral systems, legislative districting, ballot access, and campaign finance.

arguably required by principles of equality under John Rawls' conception of "justice as fairness" (Rawls 1999).

Again, the constitutional design question is whether principles of democratic equality require only equal *opportunity* to participate in elections, or whether equal *actual* participation should also be required—or at least aspired to—under the Rawlsian conception of justice as fairness. Rawls himself seems clearly to suggest that only the opportunity to participate is required for justice. His first principle of justice, the principle of "equal liberty," translates in constitutional design into what he calls "the principle of (equal) participation," which is said to require that "all citizens are to have an equal *right* to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply" (Rawls 1999, 194, emphasis added). With regard to democratic elections, Rawls states that the principle of participation requires that, "[a]ll sane adults, with certain generally recognized exceptions, have the *right* to take part in political affairs, and the precept one elector one vote is honored as far as possible" (195, emphasis added).

The fact that Rawls conceives of electoral participation as a civil right only, and not as a civic duty as well, is also fairly clear when he later indicates that "it should be kept in mind that the principle of participation... does not define an ideal of citizenship; nor does it lay down a duty requiring all to take an active part in political affairs" (200). He continues this idea and concludes his chapter on the basic requirements of the principle of participation with the following significant qualification:

In a well-governed state only a small fraction of persons may devote much of their time to politics.... But this fraction, whatever its size, will most likely be drawn more or less equally from all sectors of society. The many communities of

interests and centers of political life will have their active members who look after their concerns (200).<sup>48</sup>

Here Rawls tellingly assumes that political participation—of which voting is of course the most prominent form—will be “more or less” unbiased with respect to the socioeconomic demographics of the citizenry. This presumably implies that if voter turnout were not more or less unbiased, the principle of (equal) participation would not be satisfied. This implication is fully consistent with Rawls’ understanding of the purpose of the principle of participation, which he says, “compels those in authority to be responsive to the felt interests of the electorate” (199). However, it is of course well established empirically that voter turnout in the United States is generally biased significantly in favor of the more privileged socioeconomic demographics, and there is substantial—though admittedly not unchallenged—evidence that this bias in turnout has significant political consequences (see Chapter 3, Section 2; see also Hill 2014, 137-140; Malkopouplou 2015, 29-30).

It is not entirely clear how Rawls is able so casually to assume to that those who vote will likely “be drawn more or less equally from all sectors of society.”<sup>49</sup> Certainly the possibility of significant bias in the electorate arising from the process of self-selection into the electorate under voluntary voting is a real possibility worth considering. The only reliable way to avoid the possibility of bias—while providing an equal right to vote—is for the electorate to consist of not just a sample, but rather of the whole population of eligible voters. Of course the closer the electorate comes to universal

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<sup>48</sup> In fact, as discussed below, Rawls goes even further in outlining (without fully endorsing) a justification of J. S. Mill’s well-known advocacy of “plural voting,” with extra weight given to the votes of citizens (viz. “men”) who “can be identified as having superior wisdom and judgment” (Rawls 1999, 205).

<sup>49</sup> It seems quite unlikely Rawls would be unaware of the substantial research to the contrary on this point, even in his original work of 1971, which contains the same concluding paragraph (see Rawls 1971, 227-228), much less at the time of his revision published in 1999.

participation the smaller the possibility of bias creeping in, and so it is surely relevant that turnout in American elections is relatively low, at least in comparison to other democracies (see Chapter 3, Section 2). More to the point, however, the relevant question for Rawls' theory is not so much one of empirical statistics, but rather the question of whether someone behind the conceptual "veil of ignorance" of the "original position" (Rawls 1999, 118) would choose to make voting a civil right only or a civic duty as well, and whether purely voluntary voting could vitiate the principle of participation by increasing the likelihood of bias in the composition of the electorate.

Perhaps in ignoring the possibility of bias in turnout Rawls simply means to indicate that someone in the original position could assume that participation would be more or less equal? But the definition of the veil of ignorance does not appear to support this:

[Parties in the original position] understand political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice. There are no limitations on general information, that is, on general laws and theories, since conceptions of justice must be adjusted to the characteristics of the systems of social cooperation which they are to regulate, and there is no reason to rule out these facts (119).

It thus seems clear that someone in the original position would at least have to recognize the possibility of bias in turnout under a system of purely voluntary voting, particularly given the calculus of voting, which postulates at a basic level that the costs and benefits of voting are subject to varying assessments and impacts among various individuals and groups in the population. In fact, someone behind the veil of ignorance might well be concerned with the possibility of being part of a poorer and less educated societal group

whose members are less likely to vote voluntarily, and might therefore conclude that a democratic constitution should actively encourage everyone to vote in order to help ensure that the interests and welfare of such groups are better addressed by the political process.

It does not seem that anyone has made this particular argument;<sup>50</sup> rather, Rawls' evident support for voluntary voting appears to have been taken at face value. For example, in a thought-provoking article entitled "Voters as Fiduciaries," Edward Foley engages the Rawlsian theory to evaluate the electoral rules and procedures that would be chosen in the original position (Foley 2015). Foley conceptualizes voting as a public office in which "voters owe a fiduciary duty to act on behalf of all inhabitants of the polity, rather than to advance their own self-interests," and he consequently emphasizes not just voting rights but also voting "responsibilities" (154). He actually compares the act of voting to service on a jury, but oddly, he ignores the fact that such service is institutionalized not just a civil right but as a civic duty as well (157).<sup>51</sup> Foley echoes Rawls' general concern with avoiding bias in turnout, stating that in the original position

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<sup>50</sup> Lisa Hill does make a similar argument that the equal opportunity to vote without equality in actual voter turnout reduces democratic legitimacy, however she bases her argument not on Rawls but rather on Robert Dahl's conceptions of equality, participation, and inclusiveness (Hill 2014, 127-137).

<sup>51</sup> Foley states that just as citizens have a "right to exercise the responsibility of being a juror, so too they have a right to exercise responsibility of voting," and he further refers to "the *opportunity* for jury service" (emphasis added) comparing it to "the opportunity to serve as a member of the electorate" (Foley 2015, 158). He also compares the fiduciary office of voting to military service, stating that there is an equal right to vote just as there is "an equal right to serve in the military" (159), but again he fails to mention the possibility of compulsory service if a war necessitates a general draft. In personal correspondence, he further confirmed the military analogy, suggesting that it makes sense to treat voting like military service, which is currently voluntary. However, if high turnout is indeed viewed as a basic requirement of equal justice in a democracy, for the reasons discussed above, then perhaps voting is actually more comparable to military service during a war when conscription may be required to ensure full participation of all those eligible. Obviously, a duty to serve in the armed forces asks far more of individuals than a duty to vote, and compulsory military service is perhaps only justifiable during a war for national survival. Whether compulsory voting might ask too much of individuals is addressed below in discussing the limits of the duty to vote, but the analogous argument here is that this duty may be necessary to ensure the "survival" of equal justice in a constitutional democracy.



one would prefer “as broad an electorate as is feasible,” in order to avoid the danger that elected representatives might “serve the interests of only a portion of society, rather than serving society as a whole” (178). He further declares that the best procedure from the perspective of the original position would be to “crowdsource” the function of voting, “so that any biases that inadvertently creep into the process tend to cancel each other out” (180).

However, in discussing the specific implications of the original position for electoral rules and procedures, Foley asserts that under Rawls’ theory, “there would be less concern about maximizing voter turnout, as long as all citizens (regardless of race or other social circumstances) have equal and ample opportunities to cast a ballot” (Foley 2015, 185).<sup>52</sup> He continues, again echoing Rawls: “A citizen must have an equal and fair opportunity to participate in the fiduciary responsibility of electing society’s lawmakers. But if a citizen chooses not to take advantage of this opportunity... then the task will be performed by those who choose to do so” (185). Foley then goes even further than Rawls in explaining why voluntary voting is preferable to compulsory voting:<sup>53</sup>

From a Rawlsian perspective, society does not need every citizen to participate in the service of selecting the lawmakers. Rather, society needs those who choose to participate to do so from the perspective of endeavoring to elect lawmakers most likely to act in the public interest, and society needs that there be no barriers to participation in this form of public service (185-186).

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<sup>52</sup> Strikingly, Foley here seems to suggest that under the Rawlsian approach there should actually be *less* concern about low voter turnout than there is currently.

<sup>53</sup> Foley notes that compulsory voting is practiced in Australia, but states that it is “unlikely to take hold” in the United States (185, n. 66). However, the pertinent question here is not whether the institution of compulsory voting along the Australian model is viable in the American context, but rather whether, based on the Rawlsian original position, voting should be constitutionally structured as a voluntary right or as a civic duty as well.

However, this once again begs the critical question of why someone in the original position should not be concerned about the potential for the emergence of significant bias in turnout under a system of voluntary voting, particularly if such bias might undermine democratic equal justice, as both Rawls and Foley appear to admit.<sup>54</sup>

Foley apparently assumes that under voluntary voting, those who decide to vote rather than abstain will be more likely to cast their vote in a manner consistent with a fiduciary duty to advance the public interest, as opposed to their own self-interest. But he offers no real argument or evidence on this point, and it could well be that many of those who vote voluntarily do so to gain personal advantage, while many who would vote if induced by civic duty or sanction would do so “in good faith, on behalf of their sincere view of the public interest,” as Foley’s theory demands (Foley 2015, 186, n. 67).<sup>55</sup> Foley further assumes that those who abstain from voting do so by deliberate choice because they are simply unwilling to participate. He thus states, “If some citizens decide that they cannot be bothered to participate, then the fiduciary duty will be better performed by those who take the responsibility seriously” (185).<sup>56</sup> In fact, however, many nonvoting

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<sup>54</sup> Such ambivalence about equal participation and apparent disregard for the implications of bias in electoral turnout is not unique to Rawlsian analysis. For example, Chad Flanders admits that “[i]n modern democracies, it is thought that participation should be *equally* distributed, or at least as close to equally distributed as is legally and practically possible.” Yet he continues, “I do not think that the value of participation *requires* participation be equal.... Democracy only requires that some of the people, in some capacity, have the ability to choose their leaders” (Flanders 2013, 60, emphases in original).

<sup>55</sup> In a lengthy footnote, Foley contrasts advocacy of a duty to vote with the approach to voting ethics of Jason Brennan, who argues that individuals have a duty to abstain from voting if they are not well enough informed to competently discern the public interest (Brennan 2011a). Foley characterizes his preference for keeping voting voluntary as a “neutral” approach that represents a middle position between a duty to vote and Brennan’s alleged duty to abstain (Foley 2015, 186, n. 67). Brennan’s theory was initially discussed in Chapter 2, where it was suggested that Brennan’s position, which implies that individuals may knowingly voting “wrongly” or incompetently, may be conceptually incoherent, in addition to being normatively problematic (see Chapter 2, Section 3b, n. 15). Brennan’s epistemic argument for implementing voter competency exams to ensure minimally informed voting is also addressed in Chapter 3 (see Sections 4a and Conclusion). The relevance of epistemic voting theory to the question at hand is discussed further below.

<sup>56</sup> Foley asserts that once citizens voluntarily decide to participate, they must exercise their fiduciary duty on behalf of all those who are unable to participate, including developmentally disabled citizens who are deemed incompetent to vote (160), and even on behalf of future generations not yet in existence (161-162).

citizens are likely to abstain not so much by deliberate choice, but rather because they may be deterred by the costs of voting in the calculus, which as indicated, are distributed unequally among different individuals and groups.<sup>57</sup> According to Foley, Rawlsian equal justice simply requires that there be “no barriers to participation” (186), but again, the presence or absence of a barrier can be a matter of subjective perception.<sup>58</sup> Furthermore, the basic voting calculus—which, as indicated, would be known in the original position—includes benefits as well, the perception of which may be equally (if not more) subjective.

There is thus a strong argument that someone behind the Rawlsian veil of ignorance would recognize the necessity of adding to the calculus a non-instrumental benefit in the form of fulfilling a duty to vote—which is of course formally equal to avoiding a cost associated with abstaining—in order to prevent unequal distribution of costs and benefits from resulting in an electorate that comprises a significantly biased sample of the population.<sup>59</sup> Simply put, if allowing individuals to refuse, or to neglect, to participate in elections might put democratic equal justice at risk, then it seems prudent at

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Presumably, Foley would likewise assert that those who choose to participate must consider the interests of all the (supposedly) voluntary nonvoters. However, those who are legally ineligible to vote, or those who are not yet in existence, necessarily must rely on those who can vote, while eligible abstainers could in fact vote for themselves. Note that the issue of who should be eligible to vote is conceptually distinct from the current question, as in theory, the question of whether voting should be only a right or a duty as well could also arise with respect to a non-democratic (by modern standards) electorate that excluded some citizens.

<sup>57</sup> See also Hill (2014, 147-152), arguing that higher rates of abstention among socioeconomically disadvantaged groups cannot generally be attributed to a “positive choice” to abstain, but are rather more likely to result from the unequal distribution of voting costs. Hill also argues that disadvantaged individuals are subject to a collective action problem that results from the unequal distribution of the social norm of voting, a consideration that further echoes the voting calculus.

<sup>58</sup> Flanders goes even further than Foley in minimizing the significance of unequally distributed voting costs, stating, “Someone who is subject to inconvenience or delay is not being denied his right to vote; he still has the ability to participate.... [A]t some point, he or she is just choosing not to” (Flanders 2013, 65).

<sup>59</sup> Hill similarly argues that compulsory voting counteracts the unequal distribution of voting costs and resolves the collective action problem noted above (Hill 2014, 150-151). See also Feely (1974, 239-240), arguing that compulsory voting is justified because “selective benefits and voting costs are apt to be associated with prevailing divisions of labor, income, education, and membership in social groupings, such that certain groups of people are more likely than others to receive them.”

least to *ask* all citizens to participate—if not actually to compel them—by declaring that voting is a constitutional civic duty and not merely a civil right.<sup>60</sup> It may be fair to assert, as Foley does, that citizens have a fiduciary duty to consider the public interest over their own selfish interests when voting. However, it does not seem in accord with Rawlsian principles of justice to institute voluntary voting at the constitutional level as a means for eliciting an electorate that will presumably be more collectively concerned with this fiduciary duty. As a matter of fact, most voters already do appear to cast their vote with the intention of supporting public over private interests (see e.g. Brennan 2011a, 162, 196; Brennan 2014, 40-41),<sup>61</sup> and there is no reason to assume that among current nonvoters a larger proportion would consider only their own selfish interests if they were actually to vote.<sup>62</sup>

Additionally, beyond the dictates of justice for pursuing equality in electoral participation, there is a further argument for a constitutional duty to vote under Rawls' theory. In addition to political rights, justice as fairness also implies certain political duties and obligations for individuals living under a constitutional framework (Rawls 1999, 293).<sup>63</sup> Rawls thus states that everyone has a “fundamental natural duty... to support and to comply with just institutions,” explaining that “if the basic structure of

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<sup>60</sup> The question of how exactly such a constitutional duty to vote should be implemented and enforced is addressed below in the section on policy implications.

<sup>61</sup> Brennan cites several studies on this point and treats it as an established fact that voters generally consider the “national interest” over their own private interests when voting. He opposes the duty to vote, however, because he believes that most citizens are incompetent to discern and vote for the true national interest. See also Caplan (2007, 149), who admits unequivocally that voters are not “selfishly motivated,” although he too believes that most citizens are incompetent to vote well or correctly.

<sup>62</sup> Furthermore, the concept of voting in the public interest is inherently vague and difficult to define, as discussed in the following subsection.

<sup>63</sup> Rawls distinguishes between “natural duties,” which are said to apply to all “equal moral persons” without regard to any “voluntary acts, performative or otherwise” (98-99), and “obligations,” which arise because one has “voluntarily accepted the benefits of the arrangement or taken advantage of opportunities it offers” (96). Natural duties are said to apply “unconditionally” because they would be acknowledged by anyone in the original position (99-100).

society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do [one's] part in the existing scheme" (99). He explains this duty as having two parts, both of which seem conceivably related to a civic duty to vote: "[F]irst, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves" (293-294). Rawls never mentions voting as a possible means fulfillment of this natural duty, and as discussed previously, it is fairly clear that he conceives of voting as a voluntary—and hence supererogatory—act. Others, however, have drawn the conclusion that the Rawlsian duty to "do our share" in support of just institutions should in fact imply a duty to vote in democratic elections. For example, Carole Pateman states that "the most obvious interpretation of Rawls' argument is that, because all adults occupy the formally equal status of citizen... then all, necessarily, have certain political duties, including the duty to vote" (Pateman 1985, 121).<sup>64</sup> There is thus a strong argument from Rawlsian theory that voting should be a civic duty, not only in order to help ensure equal participation, but also because supporting political institutions by voting is a fundamental duty of citizens of a liberal constitutional democracy that meets the basic requirements of justice.<sup>65</sup>

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<sup>64</sup> Pateman further states, "[Rawls] argues that everyone has a natural duty to 'support' just, or nearly just, institutions, but he gives no indication of what kinds of actions constitute such support; it would be reasonable, however, that in the case of political institutions the support is given by citizens fulfilling their duty to vote" (Pateman 1985, 125). She also notes Rawls' apparent ambivalence regarding mass electoral participation, as follows: "Rawls has remarkably little to say about voting and its relationship to the liberty and equality of democratic citizenship on which he places so much emphasis.... Rawls says that 'the fair value for all of the equal political liberties' must be preserved, but he also toys with the ideal of plural voting [citation deleted]" (126). See also Blais and Achen (2010, 3): "Rawls seems not to have explicitly endorsed a duty to vote, but in its absence [sic.], it is difficult to make sense of his strictures that democratic citizens are ethically obligated to 'do what they can to hold government officials' to public reason, and other similar remarks [citations deleted]." Also see Hill (2014, 172).

<sup>65</sup> Pateman in fact questions whether Rawlsian institutions meet the fundamental requirements of justice (118), arguing that Rawlsian liberal democracy is essentially unjust—and unworthy of the duty of support,

The preceding demonstrates that the public interests served by a constitutional duty to vote—namely, preserving equal justice and supporting democratic institutions—are arguably compelling enough to justify intruding on any expressive right to remain silent and abstain, particularly if the constitutional duty is implemented in a manner that is narrowly tailored, for example by permitting formal and/or informal conscientious objection and abstention. However, all this might still be insufficient if there is a correspondingly compelling public interest that weighs against a constitutional duty to vote and in favor of framing participation as strictly voluntary. What then are the principal arguments against the duty to vote, which might reinforce any right to remain silent and potentially outweigh these proffered public interests in treating voting as a civic duty?

#### **b) Responding to Arguments Against the Duty to Vote**

Jason Brennan is perhaps the most outspoken contemporary critic of the notion of a civic duty to vote and the institution of compulsory voting. In a recent work on the subject, Brennan begins by asserting that voluntary voting should be the default position under liberal democratic norms, and advocates of compulsory voting therefore have the higher burden of proof (Brennan 2014, 6-7). He bases this on the assertion that compulsory voting involves a “controversial positive claim” in need of defense (7), and that it by definition involves coercion, which always requires justification in a liberal democracy (8-9). To assert that voting should be strictly voluntary, however, may also be

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through voting or otherwise—to the extent that it permits (under Rawls’ second principle of justice; see Rawls 1999, 53-55) significant socioeconomic inequality, and distinguishes too strictly between political and private spheres of society (see Pateman 1985, 122-132). Pateman is conceivably correct insofar as one who believes the liberal democratic state is unjust may have no individual-level civic duty to vote, nor any moral obligation to comply with a compulsory voting law (or perhaps even to obey other duly enacted laws), as discussed below in the section on limitations of the duty to vote, but that is a separate matter from the current question of whether voting should be constitutionally framed as a civic duty, assuming the existence of (reasonably) just institutions.

viewed as a positive claim that needs defending,<sup>66</sup> and the question of coercion can be conceptually separated from the constitutional design question of whether voting should be a right only or a duty as well.<sup>67</sup>

Furthermore, while implementing or enforcing a duty to vote in almost any manner is admittedly likely to involve some level of coercion, there are many different degrees of coerciveness, which may be more or less justified in theory and in practice.<sup>68</sup> Assessing administrative fines for unexcused nonparticipation—as in Australia—obviously involves economic coercion and possibly even loss of personal liberty if fines go unpaid.<sup>69</sup> Even a positive incentive, such as perhaps a tax credit for voting, would still involve some coercion insofar as taxation is backed by the coercive power of the state; however, a tax credit is clearly much less coercive than a fine, and it may be easier to justify. Moreover, as discussed previously—and as the case of Australia arguably demonstrates—even implementing compulsory voting through a coercive administrative

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<sup>66</sup> See *supra* n. 2 and accompanying text, indicating that even in the United States, at least half of survey respondents perceive voting as a duty rather than a choice, with higher percentages in other democracies. Brennan himself states that “the overwhelming majority of citizens... believe they have a moral duty to vote,” citing the 1990 American Citizen Participation Study showing that 96 percent of respondents reported that “doing my duty as a citizen” was a very or somewhat important motivation for voting (Brennan 2014, 47); see also Elliot (2017, 660).

<sup>67</sup> In his 2014 work cited here, Brennan is arguing mainly against the institution of compulsory voting, which he asserts is unjustified even if one assumes there is a civic duty to vote (62-82). Nevertheless, he clearly opposes the notion of voting as a civic duty, for epistemic reasons he discusses later in this work, and which he elaborates upon in his 2011 book, *The Ethics of Voting*.

<sup>68</sup> Brennan admits that there are more and less coercive means of enforcing compulsory voting ((Brennan 2014, 16-19), and he even mentions a method that involves no actual coercion—publicizing the names of nonvoters in an effort to shame them into participation (18; see also *supra* n. 21 on such a practice previously in Italy). He further states that the less coercion one advocates, the lower the burden of justification, but he perhaps wrongly asserts that the more one believes compulsory voting to be justified, the more coercion one should advocate (19). While this might make some sense in the abstract, having a strong belief in the importance of the civic duty to vote does not preclude a decision to institutionalize a relatively non-coercive means of enforcement, or even choosing no active enforcement, as discussed in the following sections. Brennan eventually asserts that even the “pettiest violations” (20) of liberty in service of a duty to vote are unjustified, because he thinks that there are “noncoercive (or less coercive) means of achieving the same goals” as compulsory voting (22), as discussed further below.

<sup>69</sup> See *supra* n. 20.

regime of strictly enforced fines should not be viewed as undemocratic or beyond the pale of liberal norms.<sup>70</sup> As Rawls recognizes, some fundamental individual liberties may justly be sacrificed to facilitate greater systemic liberty for all (see e.g. Rawls 1999, 179), and given that voting contributes to the foundation for all civil liberties—liberal democratic government itself—the freedom not to participate in elections may be a liberty that is worth sacrificing, at least in principle.

Indeed, to the extent that voting may be viewed as participation in a collective act of popular sovereignty that mirrors the formation of the original democratic social contract, it may make sense to associate it with some actual sacrifice of liberty, signifying how one gives up of the individual freedom of the state of nature in order to take part in civil society. In this vein, in his recent book *The Sleeping Sovereign*, Richard Tuck associates the early democratic sovereignty theorists, most prominently Hobbes and Rousseau, with the radical—and according to Tuck, still somewhat controversial—idea that “a sovereign people can act like a monarchical sovereign through the process of majority voting” (Tuck 2015, 257). Tuck explains that both Hobbes and Rousseau understood the act of democratic voting to represent the subsuming of individual wills within the general will, as revealed through the will of the majority (128-129), and he thus concludes that “the democratic sovereignty theorists believed that only an organised democracy in which we participate has any authority over us” (277). Although Tuck is specifically discussing voting on matters of constitutional ratification or amendment (as are Hobbes and Rousseau in Tuck’s account), voting for representatives can arguably also be seen as a constitutional-level act of popular sovereignty, given that voting

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<sup>70</sup> Brennan himself states, “I will readily admit that compulsory voting is consistent with democracy.”



determines the substantive content of constitutional offices—namely, who will hold them for the specified term.<sup>71</sup>

Related to this notion of voting as an expression of popular sovereignty reflecting the original social contract, Peter Singer suggests that compulsory voting could prevent the act of participation from implying consent to the outcome of the democratic process, and from thus yielding a moral obligation to obey the laws of the government, because true consent can only be obtained voluntarily (Singer 1973, 55-56).<sup>72</sup> However, Pateman counters Singer's argument by asserting that voting for representatives in a liberal democracy does not in fact imply consent to be governed, and would be a weak and normatively inadequate basis for justifying an obligation of obedience to the law (Pateman 1985, 87-90, 128).<sup>73</sup> The problem of political obligation is a complex issue beyond the current scope, but Pateman is probably correct in concluding that individuals should feel free to vote and yet still consider themselves morally unbound by what they regard as unjust laws.<sup>74</sup> Returning to the earlier point, the argument here is not that voting

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<sup>71</sup> Tuck briefly discusses "the modern disinclination" to the idea of popular sovereignty expressed through majority voting (Tuck 2015, 257), but he does not address the broader normative problems for a theory of popular sovereignty through representative democracy, of which there may be many (see e.g. Levinson 2014). On the radical nature of an "individualist theory of popular sovereignty" more generally, see Barnett (2007). For an interesting discussion of the roots of ideals of popular sovereignty in relation to the individual, see Gilmartin (2012). Gilmartin historically frames the 19<sup>th</sup> century conception of popular sovereignty as an "enchantment" of the individual in response to the "disenchantment" of the world, with individual voters coming to be seen as "capable of exercising autonomy as sovereignty's enchanted essence" (Gilmartin 2012, 412).

<sup>72</sup> Singer argues that participating in an election is not actual consent, but rather a form of "quasi-consent" that creates "an obligation to act as if there were consent" (49). He later argues that the act of voting gives rise to political obligation regardless of the voter's intentions (125). Singer adds that there may be "other factors" relevant to whether compulsory voting is justified (56), and in fact more recently he has written in favor of compulsory voting and endorsed the Australian model for other countries "worried about low voter turnout" (Singer 2007).

<sup>73</sup> Pateman gives several reasons for doubting that voting implies consent, but her most fundamental objection seems to be that citizens must be able to understand "what kind of commitment" they are making, yet it is "virtually impossible for them to do this in liberal democratic elections since the consequences of voting are so difficult to determine" (88).

<sup>74</sup> Furthermore, even if Singer were correct that voting (voluntarily) implies consent to be governed, this could be seen as an argument in favor of compulsory voting, which would free individuals to participate

actually embodies the democratic social contract, but rather that voting—as an expression of popular sovereignty—signifies and symbolically reflects that contract in an important sense.

In fact, denying that the act of voting has any such deep meaning and significance seems effectively essential to arguing against a civic duty to vote. In their seminal article, entitled “Is there a Duty to Vote?” Loren Lomasky and Geoffrey Brennan (2000) methodically devalue the act of voting, and it is quite clear they do not see it as an expression of popular sovereignty, or indeed an expression of much at all. In their view, “The mere act of showing up at the polls every several years and grabbing some levers is palpably inadequate to qualify as a significant act of political expression” (82). They minimize not only the expressive value of voting—the *D* term of the calculus—and deny the duty to vote; they also deny that voting can have any real instrumental value, and they further assert that the costs of voting—or of voting correctly—are prohibitively high.

Their argument begins by introducing a formal model equivalent to the rational choice calculus, and they proceed by interpreting its terms in a manner aimed at proving there can be no civic duty to vote. First they recount the well known problem of *p*, dismissing what they term “the prudential argument” for a duty to vote by affirming the near impossibility of one vote could ever affecting the outcome of a large election (66). They continue with what they call “the argument from act-consequentialism,” contending that the instrumental benefits of voting—or *B* in the calculus—are generally insignificant, since it is only rarely that the “stakes are very high” in an election, and because the informational costs of voting—the *C* term—will generally far outweigh any perceived difference in utility between candidates or parties (67-74). They summarize:

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without any implication of consent (Wertheimer 1975, 293). This of course leaves the problem of political obligation unresolved, but as indicated, that problem is well beyond the current scope.

[O]n those occasions when one's vote is most likely to make the sort of difference that stirs the hearts of act-consequentialists, there will rarely be any firm indication concerning for whom it ought to be cast; and when there is unmistakable evidence concerning which is the better candidate or policy, it is almost inconceivable that one's vote will be needed (72).

They continue by arguing that low turnout is not necessarily evidence of any democratic deficiency (78), and that the expressive value of voting is in essence no different from being “a fan of the New York Yankees” (80). They conclude provocatively, evoking Marx’s famous maxim and declaring: “Belief in a duty to vote is the opiate of democratic masses” (86).

Despite all this, Lomasky and Brennan actually admit that there could be a duty to vote for an individual living in a “small community”<sup>75</sup> that happens to have a tradition of “widespread political involvement in which each citizen plays a roughly equal and complementary part with all others” (Lomasky and Brennan 2000, 64). Under these circumstances, they suggest that abstaining might be an instance of morally offensive “free-riding on the exertions of others,” depending whether or not the individual had sought out the “advantages arising from the pattern of citizen involvement.” They indicate in a footnote that they will later explain why this “does not generalize to usual democratic politics” (n. 4), but they never appear to return directly to the example.

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<sup>75</sup> It is interesting that Lomasky and Brennan suggest this possibility of a duty to vote in the context of a “small community,” seeming to evoke the democracies of antiquity and the traditional idea that only a relatively small polis can be a true (participatory) democracy (see e.g. Dahl and Tufte 1973, 4-5). Tuck’s thesis in *The Sleeping Sovereign*—as reflected in the subtitle, *The Invention of Modern Democracy*—is that seventeenth and eighteenth century theorists of democratic sovereignty—primarily Hobbes and Rousseau—were specifically concerned with demonstrating that electoral institutions could lay the foundation for mass participatory democracy in larger modern states (see Tuck 2015, x, 249). Note that Dahl and Tufte echo the conventional view that Rousseau intended his theory only for small polities along the ancient model (see Dahl and Tufte 1973, 6); however, Tuck argues that this view of Rousseau’s work is incorrect, and that Rousseau actually “believed that ancient democracy was not an appropriate model for modern societies,” and instead envisioned new institutions that involved mass participation in elections (Tuck 2015, x, 2-8).

Instead they discuss the Kantian categorical imperative—or what they call “the argument from generalization”—which requires one to consider the consequences “if everyone were to stay home and not vote,” and they in fact conclude that “the claim that it would be disastrous if no one voted is far from evident” (75). They further argue that free-riding in general is not morally offensive unless the underlying activity is wrongful, and the act of abstaining from voting is ethically closer, in their view, to a “decision to abandon farming in order to take up dentistry,” than to “failing to pay one’s share of taxes” (77-78). Lomasky and Brennan go so far as to argue that abstainers actually confer a *benefit* on those who vote, because each voter’s probability of being pivotal increases as a result of the abstention of others (78). They also conclude that abstainers do not harm democratic functioning in any meaningful way, since low turnout—even at “5 percent participation”—does not necessarily bode ill for democracy (79).

Beyond the question of whether Lomasky and Brennan’s argument by this point strains credulity, they are clearly quite distant from the idea of voting as a fundamentally valuable expression of popular sovereignty that ensures equal justice and fulfills a foundational duty to support just institutions.

Jason Brennan’s more detailed argument against the duty to vote, in his book *The Ethics of Voting* (2011), echoes the critiques of Lomasky and (Geoffrey) Brennan and likewise proceeds by devaluing the decision to vote as reflected in the terms of the calculus. Brennan begins by citing a widely accepted “folk theory of voting ethics” that presumes the existence of a civic duty to vote (Brennan 2011a, 3), but he proceeds to argue against this view and in favor of the assertion that there is nothing morally wrong in abstaining, even for an apparently frivolous reason (4). Although he emphasizes that voting would not be a duty even if the act had “significant instrumental value” (17), he expends significant effort in the attempt to prove that no such value is possible, owing of

course to the pivotal voting problem (18-28). Brennan also addresses and purports to disprove Tuck's theory of the causal effect of individual votes, and Brennan further emphasizes that the costs of voting ( $C$ ), even just in terms of lost opportunities to do relatively unimportant things, will generally make participation irrational (28-34). According to Brennan, if someone holds the goal of seeing a certain candidate elected, but somehow "attaches no special value to... helping to cause [that candidate] to be elected," then it would be perfectly rational behavior if that person simply felt like "watching television and abstaining from voting," even if Tuck's theory happened to be correct (33).<sup>76</sup>

Interestingly, Brennan indicates that in challenging Tuck's theory of causal efficacy in voting, he aims to preempt a future attempt to "use [Tuck's] arguments to show there is a duty to vote" (28). Brennan in fact describes how such an argument could proceed from Tuck's theory based on the notion of "agency" in voting (34-36). This is interesting, because Tuck himself, in his more recent work, mentions how his theory of causation in voting is crucial specifically because it allows "for citizens to *think of themselves as agents*" (Tuck 2015, 261). Indeed, this is why Tuck's resolution of the so-called paradox of turnout is so important: By confirming that voting can be an instrumentally valuable exercise of individual causal agency, Tuck's theory allows for the possibility of voting as an act of popular sovereignty. Admittedly, Tuck doesn't discuss whether voting should be a civic duty or not, although his conception of electoral participation as expressive of popular sovereignty under mass democracy is understood to

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<sup>76</sup> Brennan's arguments against Tuck's theory are more fully addressed in Chapter 1, Section 5.

“make it the default position that everyone within the boundaries should take part in the vote in order to render its outcome authoritative for everyone” (Tuck 2015, 262-263).<sup>77</sup>

However, even if Tuck’s theory of causation in voting happened to be incorrect, and if participating in a large election were indeed always instrumentally irrational, it is still not entirely clear why Brennan (and Lomasky and Brennan) believes this to weigh so heavily against a duty to vote. In fact, viewing the act of voting as irrational arguably strengthens the argument for a duty to vote, and particularly the argument for establishing and implementing the duty in some formal manner, assuming that the production of democracy through elections is viewed as public good. After all, coercion—or some type of “selective incentive”—is in fact the conventional solution to collective action problems involving public goods that might not be produced—or produced at optimal levels—absent some incentive (Olsen 1965). Alan Wertheimer thus writes: “Elections are desirable political mechanisms which we should all help to sustain. Since the rational action for each of us would be ‘free ride’ and allow other citizens to carry the burden, we should force ourselves and our fellow citizens into carrying a fair share of the burden” (Wertheimer 1975, 290; see also Feely 1974). Thus, even if voting is generally viewed as instrumentally irrational from the individual perspective, from the societal perspective it is may still be completely rational—and indeed necessary for democracy. It may therefore make good sense to institutionalize voting—and perhaps also to enforce it—as a generally applicable civic duty. As Lisa Hill explains, compulsory voting responds to the apparent individual-level irrationality of participation by introducing a type of “system rationality” that resolves the collective action problems associated with voting (Hill 2014,

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<sup>77</sup> In this quote, Tuck is discussing the issue of whether non-citizens residing “within the boundaries” of the state can be excluded from the electorate; however, it may be significant that he states everyone “should take part in the vote,” instead of stating that everyone should have the right (or opportunity) to vote.

190-191). In Hill's words, "Compulsion collectivizes and co-ordinates 'irrationalities' of voting, thereby making them disappear" (Hill 2002b, 89).

In addition to the general collective action problem associated with the presumed instrumental irrationality of voting, Hill also discusses a "significant and paralyzing co-ordination problem" that specifically affects individuals from disadvantaged socioeconomic groups under a voluntary voting system. Since members of such groups are generally known to be less likely to participate, it might seem like an especially irrational choice for any individual in these demographics to decide to vote; under a compulsory voting system, however, Hill explains that "co-ordination among the disadvantaged is assured" (Hill 2013, 461).<sup>78</sup> This further supports the Rawlsian argument for a duty to vote to ensure equal participation and minimize inequality in turnout. Lomasky and Brennan address this issue only in a footnote late in their argument, where they admit the possibility that demographic bias in the electorate could be viewed as a "*democratic deficit* which one might be thought to have a duty to overcome"; however, they conclude that "even if this constitutes a rationale for voting by the electorally underrepresented, it just as strongly argues for abstention by the over represented" (Lomasky and Brennan 2000, 79, n. 17, emphasis in original). Brennan falls back on the same logic, claiming that arguing for compulsory voting based on a presumed civic duty to vote is inconsistent with arguing for it based on unequal participation, because if equality in participation were truly desirable, "the rich and advantaged could do the poor a favor by abstaining" (Brennan 2014, 74).

However, Brennan's main objection against the argument from unequal participation—or what he calls the representativeness argument—is that there is a "less

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<sup>78</sup> Hill also refers to this as a "prisoner's dilemma" type problem solved by compulsory voting (Hill 2014, 149-150).

expansive, more reliable, equally democratic, *more representative*, noncoercive alternative to compulsory voting” (2014, 35-36, emphasis in original). Namely, Brennan suggests using a “voting lottery” to randomly select a relatively small subset of citizens to serve as voters. This is similar to the argument discussed in Chapter 3 (Section 5a) for utilizing random selection of representatives—or sortition—in place of elections. The response given there—that elections are necessary to satisfy the value of mass participation—applies here as well, and is perhaps now even more clear: Voting lotteries and sortition are insufficiently democratic because they lack the element of participation necessary for voting to be an expression of popular sovereignty.<sup>79</sup> Tuck essentially makes this precise point in addressing similar arguments for replacing mass elections with a “fair lottery for participation in political decisionmaking.” According to Tuck, given that democratic voting is an act of agency expressive of popular sovereignty, “the lottery ceases to be a plausible alternative, as only a very small subset of the group will actually contribute to the outcome” (Tuck 2015, 261).<sup>80</sup>

In fact, even if Tuck’s theory of causal efficacy and individual agency in voting is assumed to be correct, expectations of instrumental value alone are insufficient to ensure equality in turnout. As mentioned in this chapter’s introduction, and discussed generally

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<sup>79</sup> This is also a response to the argument that some individuals from advantaged groups should abstain in order to offset inequality in turnout; in addition to the practical problems of how such a counterbalancing scheme could be implemented, this suggestion flouts the democratic value of participation.

<sup>80</sup> It is not entirely clear if Tuck is addressing random selection of eligible voters (as Brennan suggests), or random selection of representatives (sortition), but his argument applies to either case. Note how both these options differ from the suggestion of Akhil Amar for “lottery voting,” in which an election is held, but the winner is determined by random selection of a single ballot (Amar 1984, 1283). This type of system would allow for mass participation, but it would be lacking in (strict) majoritarianism, although a majority choice would have the highest probability of being selected. Tuck states generally that majoritarianism is essential because “it is the only principle that offers both equality and agency”, but he also seems open to super-majoritarian requirements that in effect increase minority power (Tuck 2015, 261). Amar’s system is designed specifically to address the problem of “overweening majoritarianism” by providing additional power to minorities, whose candidates could by sometimes prevail over those with a greater number of votes (Amar 1984, 1286).



in Chapter 2, there are many situations in which individuals will perceive little or no instrumental value in participating, such as when an election seems clearly uncompetitive, or when alienation causes one to discount the significance of any differences between candidates on the ballot. For this reason, the argument set forth here for a duty to vote does not rest on the existence of instrumental utility in voting, but rather is formally modeled in the *D* term of the calculus.<sup>81</sup> As noted previously, Brennan argues there would be no duty to vote even if voting had instrumental value, because the act could still be considered supererogatory, or it might be “just one way among others of discharging a duty to act beneficently” (Brennan 2011a, 17). Brennan thus spends an entire chapter of his book arguing for a conception of “civic virtue without politics” (43-67), and he concludes that even if there were a civic duty to contribute to the public good of democracy and avoid free-riding, or even a general duty to “exercise civic virtue,” there still would be no duty to vote. According to Brennan, there may simply be a “division of labor” in how citizens fulfill their civic duties: “Some citizens can exercise civic virtue through writing letters to the editor, others through activism, others through political philosophizing, and others through voting” (66). However, while there may indeed be many different ways of exercising civic virtue that are in some sense interchangeable, voting arguably exemplifies a minimum standard of civic virtue that should be generally applicable to all citizens of a democracy, apart from specifically justified exceptions (see Chapman 2014, 22-23). As discussed, this approach is consistent with the normative foundations of Rawlsian justice, as it seems necessary to ensure equal

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<sup>81</sup> An argument for a duty to vote based on purely instrumental reasons was outlined in Chapter 2 (Section 3b), but such a duty was explained as applying only when the value of *B* is perceived as relatively high. As discussed there, even Brennan might be forced to admit the possibility of an instrumentally based duty under such circumstances (see n. 16 and accompanying text). By contrast, the *D*-term duty advanced here is formulated as generally applicable, although it might not apply under some specific circumstances, as discussed below in the section on limits of the duty to vote.

participation and to mitigate bias in turnout, which Brennan has not adequately addressed.

In his following chapter, entitled “Wrongful Voting” (Brennan 2011a, 68), Brennan clarifies what seems to be his principle reason for assuming voting is not a civic duty even if citizens do have certain obligations of political participation. As clear from the chapter title, Brennan holds strong epistemic premises regarding the purpose and meaning of the act of voting in a democracy, and accordingly he assumes there are objective standards for judging the quality or correctness of voting decisions, as discussed in Chapter 3.<sup>82</sup> Indeed, fundamental epistemic premises, and the assumption that the information costs of voting “correctly”—or at least “well”—are prohibitively high for most citizens, appear to be at the root of most objections to compulsory voting and the duty to vote. Lomasky and Brennan thus conclude that even if there were a duty to vote, it would not be a duty just to vote but rather “a duty to vote *right*” (Lomasky and Brennan 2000, 74, emphasis in original).<sup>83</sup> Although they fail to explain what their standard of right voting entails, it is clear that in their opinion most citizens cannot meet it, and thus if there were a duty to vote, it would not be “a duty of the citizenry at large, but only of the political cognoscenti.”<sup>84</sup> Brennan provides somewhat more detail regarding his conception of epistemic standards, and it is clear that he too believes many—if not most—citizens will fail to meet those standards.<sup>85</sup>

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<sup>82</sup> Epistemic conceptions of voting are strongly related to deliberative democratic theory, as discussed in Chapter 3 (Section 4). Epistemic premises are also evident in game theoretic studies of compulsory versus voluntary voting that employ a “common values” model assuming an objectively correct decision corresponding with some “true” state of the world, as discussed toward the end of Section 3 above.

<sup>83</sup> See *supra* n. 55, and Chapter 2 (n. 15) regarding the coherence of demanding that citizens vote “right” and avoid “wrongful” voting.

<sup>84</sup> See also Abraham (1952, 349): “We could conceivably enforce voting, but we could hardly enforce informed, intelligent voting. Little would be gained by a mass of uninformed voters in the ballot booth.”

<sup>85</sup> Brennan gives some examples of what he considers wrongful voting, but declines to expound on his epistemic standards, stating that his argument “rests upon there being such a thing as unjustified political beliefs, but it need not be committed to any particular epistemology” (Brennan 2011a, 70). He later states

As discussed in Chapter 3,<sup>86</sup> Brennan has argued for implementing voter competency exams to ensure minimally informed voting, going so far as to assert that universal suffrage should be “replaced by a moderate epistocracy, in which suffrage is restricted to citizens of sufficient political competence” (Brennan 2011b, 700). This is an extreme proposal that seems unlikely to gain acceptance under existing democratic norms; however, the idea that an epistemic conception of voting might support some limitations on electoral participation is perhaps a more mainstream view. As discussed previously, Rawls assumes that voting should be a voluntary civil right rather than an obligatory civic duty, and his reliance on strong epistemic premises is clear when he further suggests that limitations on universal suffrage and the principle of “one person one vote” could be justified—at least in theory—if “the inequality of right would be accepted by the less favored in return for the greater protection of their other liberties” (Rawls 1999, 204). He thus outlines a possible justification for J. S. Mill’s proposal for a system of “plural voting,” with extra weight given to the votes of citizens who “can be identified as having superior wisdom and judgment,” because “others are willing to trust them and to concede to their opinion a greater weight.” In principle, Rawls seems to believe such a scheme might actually be justified if not for the fact that a right to equal participation “is bound to have a profound effect on the moral quality of civic life,” and to “enhance the self-esteem and the sense of political competence of the average citizen” (205).

Likewise, in Foley’s treatment of voters as fiduciaries, he notes how Rawls “refuses to condemn” Mill’s scheme of plural voting (Foley 2015, 178, n. 55), and then

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that “it is not obvious that my theory implies that only a small percentage of people will be justified in voting,” but he indicates that even if this were the case, it “need not be a problem” and “would not undermine democratic stability” (105).

<sup>86</sup> See Section 4a and Conclusion.

goes on to discuss the possibility that a Rawlsian original position analysis might support the requirement of a high school diploma for voting. Foley asserts that this is an idea which, “in theory, we cannot rule out entirely” (182), and in fact he seems only to reject it in practice because it might result in the electorate being “disproportionately skewed on the basis of race” (183).<sup>87</sup> Thus, while Foley’s notion of voters having a fiduciary duty to advance the public interest might not seem like an inherently epistemic conception, epistemic criteria nevertheless creep into his approach, for prospective voters presumably need a certain amount of political knowledge and information just to be able to distinguish between public and private interests in casting their vote. It thus seems clear that Foley views voters in some sense as distinctly epistemic fiduciaries, as evident in his suggestion that a minimum educational requirement for voting could be justified to ensure that “members of the electorate have some degree of education concerning the responsibilities to the public interest” (Foley 2015, 183).<sup>88</sup>

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<sup>87</sup> Foley indicates that literacy tests should be rejected for the same reasons (184). For evidence of the “discriminatory effects of educational requirements and civics test[s]” (183, n. 62), Foley cites Joseph Fishkin’s important article on voting rights equal and citizenship (Fishkin 2011). However, Foley seems perhaps to overlook Fishkin’s argument regarding a “universalist turn” in voting rights, under which “[t]he wrongness of disenfranchisement is not simply the wrongness of race discrimination or other similar group-based exclusion: it is also a violation of a fundamental right of citizens” (Fishkin 2011, 1345). Fishkin also mentions a shift in voting rights jurisprudence away from acceptance of epistemic qualifications to promote informed voting, as in literacy tests, and towards what he calls “the politics of universalism,” with voting understood as “a fundamental right of citizens, closely tied to citizenship itself” (1349). Fishkin does not discuss the question of whether voting should be voluntary or compulsory, although he notes that the “question of compulsory voting” is raised by Bruce Ackerman’s view that “voting is the paradigmatic form of *universal* citizenship participation,” which implies that “a high level of participation in the form of voting is a necessary component of a robust democracy” (1301, n. 41). However, Fishkin also indicates that a citizen’s participatory interest in voting is fulfilled by simply having the right to vote and “does not depend on whether a voter actually *exercises* the right” (1300).

<sup>88</sup> Foley does explain exactly what he means by “education concerning the responsibilities to the public interest,” and it is admittedly not entirely clear if he is referring just to education concerning the concept of the fiduciary responsibility of voting, or if he also means to include learning enough substantive political information to identify the vote choice consistent with the public interest. If he is not articulating a standard of substantive knowledge, then it is perhaps unclear why a high school diploma would be necessary, as individuals can probably understand the concept of voting for the public interest even without graduating from high school.

The problem is that Foley's concept of voting in the public interest, like Brennan's stronger epistemic conception, is inherently vague and difficult—if not impossible—to define. For example, is a vote intended to benefit one's own social group at the expense of other groups considered voting in the public interest? Or voting for one's preferred political party? Or based on personal religious beliefs? What about voting to benefit one's own state or locality at the possible expense of the national interest? Some might even suggest that voting in the national interest at the expense of the global public interest could involve a violation of fiduciary responsibility. Contrary to Foley's argument, such ambiguities provide reasons for someone in the Rawlsian original position to decide against constitutionally designing an electoral system and implementing voting procedures in a way meant to ensure that voters intend to benefit some conception of the public interest. This point also applies generally to stronger epistemic standards, for even if valid epistemic criteria for correct and incorrect voting decisions did exist (which is certainly debatable), such criteria would likely be impossible to conclusively identify in a manner that “could be accepted by all qualified points of view” (Estlund 2008, 33). Since anyone in the original position would not know if they might be one of those whose views would be identified as incorrect, insufficiently informed, or contrary to the public interest, one would seek to avoid this possibility by avoiding strong epistemic standards in electoral rules and procedures.

Furthermore, if Foley's concern with demographic bias in the electorate weighs so conclusively against requiring a high school diploma to vote, why is he apparently unconcerned, as indicated previously, with the inequality in turnout that results from constitutionally structuring voting as voluntary rather than as a civic duty? In fact, just as Brennan is arguably wrong in his assertion that blocking some citizens from voting will yield “better” decisions that are more consistent with the “true” public interest, so is

Foley arguably mistaken in believing that keeping voting voluntary will tend toward that same goal. The notion that everyone who votes should—ethically speaking—intend to benefit the public interest is not that controversial.<sup>89</sup> Admittedly, if any subset of citizens could really be trusted always to correctly identify the choice most consistent with the true public interest, it might be acceptable for only that subset to participate, at least in principle. In reality, however, no subset of citizens can be trusted in this way, particularly if one has doubts as to the validity of any particular epistemic or fiduciary standards for good decisions. Therefore, as previously argued, in the original position one would seek to prevent the turnout inequality likely to arise under voluntary voting, and instead encourage everyone—or as close to everyone as possible—in the eligible population to participate, by institutionalizing voting as a general civic duty. Indeed, voluntary voting may only make sense to the extent that one assumes the validity of given standards for good decisions, *and* one believes so strongly in those standards that any resulting demographic bias in the electorate is deemed unimportant. Furthermore, one must of course also believe that a process of voluntary self-selection into the electorate will tend, on the whole at least, to result in the participation of more voters whose choices are consistent with the given standards.

Nevertheless, even granting the dubious existence of unassailable epistemic criteria, there would still be an argument for keeping epistemic democratic theory “in its right place” and excluding such criteria from the constitutional design of electoral

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<sup>89</sup> Foley is perhaps right to suggest that voters have a fiduciary duty to consider the public interest in some sense, and Brennan could even be right that it would be ethically better if those who intended to support their own “selfish” interests at the expense of the public interest—or otherwise intended to knowingly vote “badly”—would simply abstain. However, in terms of constitutional design based on the Rawlsian original position, voting rules and procedures should arguably still be structured under the assumption that individuals are free to vote for their own private interests if they so choose. This is primarily a theoretical point, since voters do generally intend their votes to benefit the public interest, or at least their conception of it (see *supra* n. 61 and accompanying text).

participation.<sup>90</sup> Returning again to *The Sleeping Sovereign*, Tuck’s approach builds on a fundamental distinction early democratic theorists made between the political spheres of “sovereignty” and “government.” If voting for representatives is viewed as a quintessential expression of democratic popular sovereignty—as Tuck’s theory arguably suggests—then it may be that while the activity of *government* is subject to strong epistemic standards of correctness, the exercise of *sovereignty* in the popular authorization of democratic representatives should remain a matter about which there are no objectively right and wrong answers.

Notably, this perspective on the argument for a civic duty to vote does not depend on the consequentialist issue of whether and how outcomes might change under higher levels of turnout.<sup>91</sup> As Hill argues, the democratic values of “‘equality,’ ‘effective participation,’ and ‘inclusiveness’ aren’t valued and upheld only when they yield particular outcomes; they are valued and upheld *regardless* of the outcome” (Hill 2014, 141). Thus, if full participation—or as close to it as possible—is viewed as an essential element of democratic sovereignty, its effect on outcomes may be largely irrelevant.<sup>92</sup> From this perspective, regardless of any standards of correctness that might apply in evaluating outcomes within the sphere of government, the sovereign activity of voting to appoint representatives should be an area where such standards are inapplicable.

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<sup>90</sup> See generally Chapter 3 (Section 4c) for a discussion of the “right place” for epistemic democratic theory.

<sup>91</sup> On the relationship between turnout and electoral outcomes generally, see Chapter 3 (Section 2). See also *supra* ns. 27-29 and accompanying text for a discussion of the effects of compulsory voting on political outcomes.

<sup>92</sup> This is not to say that democratic participation is valued for purely procedural reasons. Hill admits that if full participation began to “routinely produce outcomes that we wouldn’t expect or desire—for example, if high turnout elections started to exacerbate rather than ameliorate bias—the procedures would need to be reevaluated” (Hill 2014, 141, n. 50). Furthermore, as discussed in the concluding section below, democratic legitimacy may require a confidence that outcomes are a “true” expression of popular sovereignty in the sense of accurately reflecting the collective preference of the majority of eligible voters.

In the end, it may be necessary to choose between targeting voting rules and procedures toward improving the *quality* of the electorate, or toward improving *equality* by minimizing the chances for demographic bias in turnout and enhancing popular sovereignty by encouraging full participation. Those who choose the former route must of course be prepared to defend their notion of quality and to explain clearly how their proposed voting rule will improve it. The argument here, however, is that supporting participatory equality through a duty to vote is more consistent with fundamental democratic norms, although admittedly this view appears contested by contemporary treatments of voting in liberal democratic theory and constitutional design.<sup>93</sup> Voting rules and procedures provide a ready tool for implementing broadly professed standards of correctness in political decisionmaking. This gives rise to arguments that voting should remain strictly voluntary, as discussed above, and it may likewise support proposals for higher substantive voting costs intended to dissuade “bad” decisionmakers from participating, as discussed in Chapter 3. The argument in that chapter was that strong epistemic standards are not needed for a coherent and comprehensive understanding of the role of voting in a representative democracy, and that mass participatory democratic theory is therefore defensible, in principle at least, without such standards. Here that

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<sup>93</sup> As an additional example, John Ferejohn has recently asserted that the duty to vote is problematic, because from the standpoint of liberal theorists who believe that “the justification for government is instrumental to private self-rule, it does not seem obvious that the instrumentalities of government inherit any strong priority over private choices” (Ferejohn 2015, 233, n. 8). This assertion perhaps needs further explanation, which Ferejohn does not provide, and arguably he mistakes voting as an instrumentality of *government*, while it is better conceived as an instrumentality of *sovereignty*. Furthermore, the context of Ferejohn’s argument seems to show that he holds epistemic assumptions about voting, as he worries that ballot secrecy prevents the verification of whether citizens have “good” reasons for their electoral choices. Admittedly, Ferejohn may be correct to the extent that private moral obligations can take ethical precedence over publicly owed duties, as discussed in the following subsection. However, this does not mean that voting should not be constitutionalized, and possibly enforced, as a general civic duty; it just means there can and should be exceptions for those who have personal moral objections to participating. Ferejohn also argues that voting should not be a duty because abstaining can itself be a kind of political expression, an argument was discussed previously in connection with the question of a right to abstain (see Section 4 *supra*).



argument is extended, and an affirmative basis for the value of participation is set forth more clearly: The civic duty to vote that follows from conceiving of voting as the quintessential expression of popular sovereignty—effective to the extent that (as close as possible to) everyone participates—supplies the missing foundation for broadly participatory theory and practice under modern conditions of representative democracy.

### **c) Limitations on the Duty to Vote**

Even assuming a constitutional-level civic duty to vote, it is important to acknowledge that such a duty may have its limits. An initial issue concerns the fact that—given the secret ballot—even strictly enforced compulsory voting laws do not compel the actual casting of a valid vote, and in practice individuals can choose to abstain by casting a blank or intentionally spoiled ballot, as discussed previously.<sup>94</sup> The question thus arises whether a constitutional duty to vote should be formally understood as an obligation actually to *vote*, or as a more limited duty basically just to appear at the polls. In other words, should compulsory voting really be understood, and perhaps even constitutionalized, as compulsory *turnout*, as some proponents of the duty to vote have suggested?<sup>95</sup>

Opponents of compulsory voting have asserted that a duty “simply to *turn out* and tick your name off a list” is not normatively meaningful, and it may indeed even be incoherent to the extent proponents mean to suggest that “it is easier to justify compulsory turnout than compulsory voting” (Lever 2009, 224; see also Saunders 2010, 75). Sarah John thus asserts that admitting that compulsory voting really entails only compulsory turnout “fatally undermines the case that having all people vote, from all social classes, is so important that the state should compel it” (John 2015, 432).

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<sup>94</sup> See *supra* n. 41 and accompanying text.

<sup>95</sup> See *supra* n. 43 and accompanying text.

Admittedly, such critics may be correct in pointing out that a formal duty simply to appear at the polls does not seem to be very meaningful standing alone.<sup>96</sup> Any law or administrative procedure that required only turnout would thus presumably rely normatively on a more fundamental duty to actually vote. At the constitutional level, therefore, it is perhaps more correct to speak of a civic duty to vote, and it may also be more accurate to refer to the laws and procedures of “compulsory voting” rather than “compulsory turnout.”<sup>97</sup> Nevertheless, it is arguably not just coherent but actually quite useful to consider a constitutional duty to vote that is administered in practice as compulsory turnout. Admitting that actual compulsion of valid voting may be neither practically nor normatively desirable in implementing and enforcing a constitutional duty to vote should not mean giving up on the fundamental importance of “having all people vote, from all social classes,” as John suggests.

Nonetheless, it must be admitted that compulsory turnout alone, even without compulsory voting, could still be viewed as unacceptably coercive. As indicated, whether a given level of coercion is justified under liberal norms is an issue that requires weighing the competing interests of the individual and the state, although this can be seen more as a question of administrative implementation and enforcement, rather than an issue of constitutional design. That said, there is certainly an argument that citizens should not be coerced even to appear at the polls and have their names checked off a list, particularly if they have principled objections to doing so. Some of those who are extremely alienated might wish to express their opposition to the political system specifically by not turning

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<sup>96</sup> This is not to say that turnout alone can have no meaning in itself. For one thing, turning out might lead in the future to actual voting, and furthermore, “participating” by casting an invalid vote as an act of protest could also be valued as a form of expression.

<sup>97</sup> The term “compulsory participation” might also be accurate, and a constitutional provision could set forth a civic duty to “participate” in elections, which perhaps leaves somewhat open the question of whether an actual valid vote is required.

out, and by abstaining completely rather than being seen as participating in the election in any way. This would be consistent with allowing for conscientious objector status, and the constitutional duty to vote could be interpreted and administered so that any objection based on sincerely held personal beliefs would serve as a valid excuse.<sup>98</sup> Indeed, the competing interests reflected in these two constitutional provisions—the civic duty to vote and the individual right to free expression—are arguably best reconciled in this manner. Presumably, the state would still be within its rights in compelling objectors to formally express their objection in some form, whether before or after the election, but this could be seen as just a general instance of the fact that individuals are not free to completely ignore administrative or judicial process, even in the most liberal of liberal democracies.

Thus, whether structural limitations to compulsory voting were provided by the constitutional text itself, or applied through legal and administrative channels, it would not make the concept of the civic duty to vote incoherent either in theory or in practice. In the end, however, the moral force of a compulsory voting law or constitutional duty to vote would only be as strong as any law or constitutional provision might happen to be, and the general problem of political obligation under liberal democracy, as noted previously, is a complex and difficult one (see Pateman 1985).<sup>99</sup> While there may be a civic duty to support just institutions, as Rawls states, “The real question is under which circumstances and to what extent we are bound to comply with unjust arrangements”

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<sup>98</sup> This would contrast with enforcement of compulsory voting in Australia, where a political objection to participating appears not to constitute a valid excuse for abstaining, although a religious objection is deemed sufficient (see *supra* n. 19).

<sup>99</sup> See *supra* ns. 73-74 and accompanying text. Machin argues that a law compelling turnout is normatively coherent simply because citizens have a duty to obey any “democratically made law” (Machin 2011, 104-105). This is debatable, however, so it may be better to conceptualize a constitutional duty or legal obligation that fundamentally demands voting, but which may be implemented and enforced to require only turnout.

(Rawls 1999, 308). Individuals may decide to disobey a compulsory voting law whether it requires actual voting or just turnout, though of course such disobedience—even if it happens to be justified—may have consequences in terms of sanction.<sup>100</sup> It is thus crucial to distinguish conceptually between a purely political obligation founded on a constitutional civic duty to vote, and the more personal moral obligations of individuals, which could indeed engender a duty to abstain based on fundamental objections to the political system (see Hanna 2009).<sup>101</sup> As Rawls recognizes, all political obligations have limits, and they “may sometimes be overridden” (Rawls 1999, 309).

Another possible limit on the duty to vote involves the attitude of indifference. As discussed in Chapter 2, individuals can be instrumentally indifferent either through complete lack of information about the options on the ballot, or because they perceive the options as effectively equivalent. Either way, a duty to vote should not be understood to suggest that anyone who is truly indifferent to the outcome of an election should nevertheless cast a vote.<sup>102</sup> In common practice, this means there is no requirement to vote in every election on the ballot, as there may be good reasons to allow indifferent voters to engage in “rolloff” and abstain in down-ballot state and local races, or other

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<sup>100</sup> See *supra* n. 45 and accompanying text; see also Rawls’ general discussion of justifications for civil disobedience and “conscientious refusal” (Rawls 1999, 319-335).

<sup>101</sup> Hanna argues that given an unjust and fundamentally undemocratic political regime, one may be ethically required to abstain rather than “contributing to the false and harmful appearance of legitimacy” (Hanna 2009, 277). In terms of the calculus, this could be modeled as expressive disutility in the *D* term (see *supra* n. 1 and accompanying text). Notably, Hanna admits the possibility of a moral duty to vote based on purely instrumental motivations in the case of “a close election that poses the threat of a particularly horrible candidate being elected,” which could “outweigh worries about perpetuating unfairness” (282).

<sup>102</sup> This is perhaps another reason for implementing and enforcing the duty to vote in practice as compulsory turnout only, for individuals should arguably be free to abstain if they are truly indifferent. This again contrasts with the enforcement of compulsory voting in Australia, where voting appears to be required even for those with no clear preferences: The Australian Electoral Commission’s website cites the case of *Lubcke v Little* VR 807 (Supreme Court of Victoria, 1970), in which the court ruled that a “subjective incapacity” to form a preference ordering among candidates did not constitute a valid excuse for failing to vote (AEC 2014; see *supra* n. 19).

items on the ballot about which they may have insufficient information to make a choice (see Wattenberg et al. 2000).<sup>103</sup> There is thus no implication that individuals should vote randomly, or for reasons that they themselves would not regard as meaningful, simply to fulfill their civic duty.<sup>104</sup> Moreover, as discussed in Chapter 3, the voting decision must retain at least minimal epistemic qualities, although this is arguably better understood as a minimum standard of cognitive capacity, rather than a standard of political knowledgability.<sup>105</sup> While citizens ideally should vote in an informed manner, the definition of what exactly that means must be allowed as highly subjective, and no particular conception of informed voting should be implemented or enforced through electoral rules and procedures. In general, the argument from Chapter 3—and continued in this chapter—is that election law and policy should be structured to increase turnout as much as possible. If the duty to vote reflects the value of mass participation as an expression of popular sovereignty, then even though completely indifferent voting is not normatively desirable, strong epistemic conceptions of voting should be rejected, particularly to the extent they may be used to argue for higher substantive costs or limiting electoral participation in any way.

A somewhat harder issue involves whether instituting the duty to vote as a general obligation of citizenship simply requires too much of individuals. In his book *The Limits of Obligation*, James Fishkin asserts that general obligations tend to interfere with “the robust zone of indifference” that must be assured in a liberal democracy (Fishkin 1982,

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<sup>103</sup> As discussed in Chapter 2, informational indifference may be more common in “second-order” elections that receive more limited media attention and often lack partisan affiliation as an informational cue on the ballot, although there may be ways to address such problems (see Chapter 2, Section 4; see also Chapter 3, text accompanying ns. 86-87).

<sup>104</sup> There might arguably even be a duty to abstain in such situations rather than knowingly voting “badly” (see *supra* n. 89).

<sup>105</sup> See Chapter 3, n. 64 and accompanying text.

23).<sup>106</sup> This raises the question: how burdensome are the actual costs that a duty to vote would impose on democratic citizens? Even assuming that the substantive costs of casting a ballot are not prohibitive, the deeper issue comes down to information costs. Proponents of compulsory voting must admit that the duty to vote includes a duty to be at least minimally informed about electoral choices, and not to remain completely indifferent by willful ignorance. Although there is a great deal of free or very low cost information available today—as Downs indicated there was even in his day (see Downs 1957b, 146)—opponents of compulsory voting nevertheless may insist that the information costs of voting in even a minimally responsible manner are prohibitively high for many—if not most—citizens. Epistemic theorists like Brennan obviously believe this, and Fishkin himself appears to agree, as evidenced by his work on deliberative democratic theory discussed in Chapter 3.<sup>107</sup> Assuming that epistemic and deliberative theorists are wrong at least with regard to citizens who have some basic interest in politics, those having no interest in politics whatsoever do pose a more difficult problem. For such individuals, the informational costs of voting might be perceived as simply too high, and so there may be a real question whether asking these citizens to devote some

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<sup>106</sup> Fishkin identifies the zone of indifference with Isaiah Berlin's (1969) conception of "negative liberty" (see Fishkin 1982, 20, n. 1). Notably, a civic duty to vote would not technically be considered a general obligation as Fishkin defines it (27), because voting is an example of an act that is "agent specific" (160), since it can only be performed once (legally) in any election. Fishkin does not address whether a duty to vote would go beyond the "limits of obligation," although he mentions an assumption that "any special obligations attached to citizenship" are not overly burdensome (43, n. 8). Nevertheless, Fishkin discusses voting extensively as a typical example of the problem that general obligations pose in large groups given the apparently negligible effects of an individual vote, and he also discusses voting in the context of Kantian generalization arguments (102, 109-110). Interestingly, Fishkin's analysis prefigures Tuck's approach in *Free Riding* with regard to the theory (attributed to David Lyons) that threshold effects offer a possible solution to the problem of negligibility (Fishkin 1982, 111-123). However, Fishkin appears to make the mistake Tuck mentions of not realizing how each contributor can claim responsibility for the entire benefit, not just a proportional share (124-127; see Tuck 2008, 41); see also Chapter 1, Section 5, regarding the same mistake made by Brennan (2011a).

<sup>107</sup> See generally Sections 4a & 4b.

attention to politics, to form an opinion, and to vote, might actually begin to infringe on their protected “zone of indifference.”<sup>108</sup>

While there may be no definitive answer to this question, the argument here is that requiring even these completely disinterested citizens to pay attention to politics and incur some information costs around election time does not in principle ask too much, because the standards for informed voting are not very high, as discussed in Chapter 3, and as discussed in this chapter, participation of as many citizens as possible helps to ensure and enhance democratic popular sovereignty.<sup>109</sup> Nevertheless, given the limitations on implementing and enforcing the duty to vote in practice, there will always be opportunities for some citizens to remain blissfully disinterested if they so desire. Moreover, if the civic duty to vote includes a duty to be at least minimally informed, it arguably follows that the state may also have a duty to help facilitate citizens’ acquisition of political information. It would certainly seem like a worthy policy goal to help citizens become more politically informed, whether through support for civic education and other efforts to increase access to information, or by structuring elections in ways that reduce information costs and diminish opportunities for indifference, as discussed in Chapter 2 (Section 4). This approach might also offer support for regulation of political campaigns and the media in the interest of more informed voting, although in the U.S. this of course

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<sup>108</sup> See also Elliot (2017, 666) on this general objection. Perhaps another difficult question involves whether it is asking too much to require those who are deeply *ambivalent* about their vote choice to reach a decision by creating identity-defining “voluntarist reasons” for how they vote—as discussed in Chapter 2 (Section 3c). As indicated there, those who are politically ambivalent generally seem self-motivated to reach a decision and vote; however, if one were truly unable to reach a decision it would presumably provide an acceptable excuse for not voting, as the individual would be functionally indifferent.

<sup>109</sup> It is also possible that a duty to vote might lead some of these disinterested citizens to take an interest in politics in the future and become more politically informed and active (see Lijphart 1997, 10), although as discussed in Section 3 *supra*, the results of empirical studies in this area are inconclusive.

raises highly contentious free speech issues under the First Amendment.<sup>110</sup> Nonetheless, those who are truly concerned with uninformed voting might consider some of the things the state can do on the supply side of information, rather than focusing exclusively on the demand side of how citizens can (or cannot) acquire more and better political information.

There are other issues to explore regarding possible limits on the duty to vote: For example, one question is whether the duty should apply in all elections, or perhaps it should apply only in “first-order” elections for higher offices, but not in all state and local races or other down-ballot elections. As discussed, second-order elections can pose more difficult informational problems,<sup>111</sup> but these may also be the types of elections that could benefit most from a duty to vote, since turnout in these races is often so low. Relatedly, there is the question is how *often* citizens can be obliged to vote, which has consequences for whether elections at different levels of government should be consolidated or held separately, as discussed in Chapter 3, as well as possible implications for whether there should be a duty to vote only in general elections or in primaries as well.<sup>112</sup> Furthermore, one could wonder whether the duty to vote should apply to direct democracy initiatives, which can implicate more difficult informational issues than voting for representatives.<sup>113</sup>

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<sup>110</sup> In any liberal democracy, the state clearly does not—and indeed should not—have the same control over the information costs of voting as it has over substantive costs; however, this does not mean the state should exercise no control at all over the distribution of information costs.

<sup>111</sup> See *supra* n. 104.

<sup>112</sup> Basic information problems can also arise in primary elections, particularly given the absence of a party cue; however, whether primaries should also be subject to a duty to vote is a more complex question. Higher turnout, at least among partisans, arguably might be needed to assure the “legitimacy” of candidate selection, but the wider issues of normative legitimacy that arise in general elections do not seem as urgent in the context of primaries. Nevertheless, party primaries play a crucial agenda-setting role in a majoritarian system, and any duty to vote should arguably apply also in primaries, as advocated by Mann and Ornstein (see *infra* n. 126). See also Abu El-Haj (2016) on the importance of a “broad and representative” electorate in primaries.

<sup>113</sup> See Chapter 3, n. 38. There is a strong argument that any referendum on a proposed constitutional amendment (or on initial ratification) should be included in a duty to vote, since these concern fundamental matters of popular sovereignty under Tuck’s approach. However, constitutional amendments in some states



However, further discussion of the contours of the duty to vote and its limits must await a work focused more specifically on addressing these questions. Here the objective has been to present an argument that participating in elections should be a constitutional-level civic duty as well as a civil right, to respond to some of the main objections to the duty to vote and compulsory voting, and to briefly discuss some of the limits of the duty in theory and practice. The next section will proceed to consider some of the implications that recognizing a civic duty to vote could have for election law and policy.

## **5) IMPLICATIONS FOR ELECTION LAW AND POLICY**

The objective of encouraging universal participation of all eligible voters emerges from the foregoing analysis and argument, and it is important to recognize that election law and policy is essential in helping to reach this objective. Some opponents of compulsory voting might concede that voting is a social duty, or a moral obligation of some sort, but will nevertheless insist that this duty or obligation should not be legally enforceable in any way (e.g. Abraham 1952, 348).<sup>114</sup> In fact, even without any implementation or enforcement, or indeed any changes to election law and policy, the formal recognition of a civic duty to vote could have significant consequences for voting behavior. A compulsory voting law—even if not strictly enforced—might encourage citizens to vote simply by reinforcing a social norm of voting (see Hasen 1996, 2168; see also Birch 2009, 148).<sup>115</sup> As Patricia Funk explains, the legal duty to vote may also serve

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may be more like ordinary legislation through direct democracy than matters of fundamental constitutional design.

<sup>114</sup> According to Abraham, “Voting is not a social duty that should be made a legal duty. It is a moral obligation, a demonstration of responsible citizenship, a worthy endeavor, but not a duty enforceable at law” (Abraham 1952, 348).

<sup>115</sup> This could be true notwithstanding the finding that compulsory voting’s effect on turnout is strongest when accompanied by strict enforcement (see e.g. Panagopoulos 2008).

an “expressive” function, reflecting what she calls the “moral message” of legal norms, which can induce individuals to vote independently of any sanctions for noncompliance (Funk 2007, 139).<sup>116</sup> Moreover, there is abundant evidence that social motivations in general are important factors for inducing turnout at the individual level (see *supra* Section 2).

Nevertheless, beyond its effect on voting behavior, it is difficult to imagine that formally recognizing a civic duty to vote would not have major implications for election law and policy. Richard Hasen’s seminal article on compulsory voting is entitled “Voting Without Law” (1996), and by voting “*with* law” Hasen essentially means compulsory voting enforced through negative sanctions (2169-2172).<sup>117</sup> However, because he believes that this is not a viable option for the United States, Hasen is forced to conclude that for many citizens in this country, voting without law “means simply not voting” (2178). However, Hasen curiously seems to neglect the fact that there is far more to the involvement of law in the motivations for voting beyond the possibility of sanctions for abstention.<sup>118</sup> In an important if obvious sense, there can be no such thing as voting “without law,” since rules and regulations are of course necessary to the functioning of elections. In a deeper sense as well though, the laws and administrative procedures of elections fundamentally *structure* the act of voting and may thereby influence the

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<sup>116</sup> Funk finds that removal of the formal legal obligation to vote in several Swiss cantons led to a significant reduction in turnout, even though sanctions had previously been extremely low and effectively only symbolic (Funk 2007). She theorizes that a compulsory voting law could affect behavior even without any enforcement whatsoever, but that some minimal enforcement might be useful to maintain the strength of the social norm of voting (155).

<sup>117</sup> Hasen takes his article’s title from Robert’s Ellickson’s book on social norms, *Order Without Law* (1991).

<sup>118</sup> Also, Hasen’s article discusses only the question of whether legal norms can serve as a substitute for social norms, but strangely perhaps, he does not seem to address the possibility that legal norms could also work to strengthen otherwise weak social norms, as could be the case with voting. Although this topic is beyond the current scope, legal and social norms are probably best seen as potentially working together and interacting in complex ways, rather than merely substituting for one another.

individual turnout decision in many different ways. Whether voting is considered a right only or a duty as well should therefore be seen to have major implications—from the highest levels of fundamental law, down to the administrative implementation of electoral policy—all distinct from the issue of whether there is any enforcement mechanism for actively compelling participation.

The highest level legal implication would be the possibility of formally constitutionalizing the duty to vote. Recently there have been recurring calls for an amendment to the U.S. Constitution to explicitly provide for a *right* to vote, coming from politicians (H.J. Res. 25, 114<sup>th</sup> Cong.), legal scholars and practitioners (Raskin 2004; Nelson 2013; Daniels 2017, 601-604), and policy advocates (Soros & Schmitt 2013; FairVote 2017).<sup>119</sup> However, it appears that no one has yet suggested that such an amendment to the Constitution might establish voting as a civic *duty* as well as a civil right. If there is ever to be a new constitutional convention in this country, as some have urged there should be, the question of whether voting should be only a right or a duty as well is surely something worthy of consideration (Levinson 2006; 2012, 116-117).

Before considering the question of whether and how to implement and enforce the duty to vote, the mere recognition of a constitutional-level civic duty could have significant implications for the jurisprudence of voting rights in this country. The most important implications could be for cases alleging that the administrative rules or procedures for voting are so burdensome that they effectively deny the right to vote, or

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<sup>119</sup> See *supra* n. 36 on the ambiguous status of the right to vote in American constitutional jurisprudence. The most recent bill proposing a constitutional amendment on the right to vote, House Joint Resolution 25, 114th Congress (2015-2016), was introduced by Rep. Mark Pocan (D-WI) and co-sponsored by 40 other Democratic representatives (<https://www.congress.gov/bill/114th-congress/house-joint-resolution/25/text>). There has been some pushback on a voting rights amendment from election law scholars who argue that agreement on the text of an amendment would be extremely difficult, and it would likely fail to resolve many of the most pressing voting rights issues (Gerken 2014; Briffault 2014).

what election law scholars have termed “new vote denial” cases.<sup>120</sup> If a claim of vote denial were characterized as preventing a citizen from exercising a fundamental civic duty as well as a fundamental civil right, this would certainly provide additional weight to the individual interest when courts perform balancing tests against state interests, as in the controversial voter identification case, *Crawford v. Marion County* (2008). As discussed in Chapter 1 (Section 7),<sup>121</sup> Joseph Fishkin (2011) criticizes the use of “structuralist,” or group-based conceptions of voting rights in such cases, arguing that courts should instead recognize the value of participation for individual citizens. A duty to vote similarly draws attention to the individual interest in normative conceptions of election law. Fishkin argues that this interest should be protected against “dignitary harm” (Fishkin 2011, 1296), and in Chapter 1 it was argued that instrumental motivations provide an even stronger reason for individual-level protection of voting rights; this chapter now provides another strong reason based on the non-instrumental motivation of fulfilling one’s civic duty. Furthermore, recognition of a duty to vote also bolsters the argument, as set forth in Chapter 3, that a strict scrutiny standard of review should apply in judging whether specific impositions of substantive voting costs are constitutional.<sup>122</sup> If voting were not only a fundamental right, but a fundamental duty as well, the argument is even more forceful that the government should bear the brunt of the costs of administering elections, and it should not be permitted to shift these costs onto individual citizens in a manner that unduly burdens their participation, unless the administrative procedure can be demonstrated as narrowly tailored, and the least restrictive means of fulfilling a compelling interest in electoral efficiency or integrity.

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<sup>120</sup> See Chapter 1, n. 38.

<sup>121</sup> See also Chapter 3, n. 9.

<sup>122</sup> See Chapter 3, Section 5b.

Establishing a constitutional duty to vote could also have major implications for U.S. electoral policy even without enactment of a compulsory voting law. One example is the system of voluntary registration used in American elections, which is fairly unique among contemporary democracies (see Rosenberg and Chen 2009, 1). If voting were established as a duty as well as a right, it might make more sense for voter lists to be compiled by the government under a system of “automatic” or “universal” voter registration (see Tokaji 2008, 502-503).<sup>123</sup> Alternatively, same-day and Election Day registration procedures would receive support from formal recognition of a duty to vote, as it would seem harder to justify imposing an additional burden of prior registration in order to fulfill one’s civic duty. Strict voter identification laws that do not allow for reasonable individualized exceptions could also be more problematic from a policy perspective focused on voting as civic duty. In general, recognition of a duty to vote would entail a very different perspective on the role of the state in administering elections. Under the current system of purely voluntary voting, it stands to reason that the state should essentially just avoid “overburdening” participation, however that is defined. If voting were a duty, however, the state would conceivably have a more affirmative responsibility for ensuring that participation is as easy and accessible as possible, as Hill illustrates in her description of the extensive efforts in the Australian system to ensure that everyone eligible is able to vote (Hill 2014, 122-123).<sup>124</sup> In general, all this provides

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<sup>123</sup> If a compulsory voting law were enacted, another possibility would be to make registration compulsory along with voting (see Tokaji 2008, 504).

<sup>124</sup> Of course the actual enforcement of compulsory voting in Australia makes this argument even stronger. See also Elliot (2017, 659), indicating that policies to minimize substantive voting costs should be implemented along with sanctions for failure to appear at the polls. Elliot indicates that his argument for “mandatory turnout” does not take a position on whether voting should be considered a duty (657). Of course, even if voting is considered a right only and not a duty, the government may still take on a more affirmative responsibility for making voting accessible to all citizens, as appears to be the case in India, for example (see Roy 2012, 174; Mukherji & Anand 2014). See Gilmarin (2012) for a discussion of the emergence of conceptions of popular sovereignty and voting in India. According to Gilmarin, differences

added support to the arguments in Chapter 3 (Section 5) for keeping substantive voting costs as low as possible and strengthening the overall policy mandate for high levels of turnout.

The question then arises as to whether to implement and enforce the constitutional duty to vote, and if so how. Should voting in the United States be compulsory? Hasen's assessment that enforcement of the duty to vote through negative sanctions "has virtually no chance of enactment in the United States" probably still rings true (Hasen 1996, 2173; see also Tokaji 2008, 505).<sup>125</sup> Nevertheless, there have been some calls for compulsory voting along the Australian model from notable political science and policy scholars, and from at least one very notable politician. As mentioned previously, Arendt Lijphart advocated for this in his APSA presidential address (Lijphart 1997). More recently, in their widely read book, *It's Even Worse Than It Looks*, Thomas Mann and Norman Ornstein feature compulsory voting as one of their most prominent proposals aimed at resolving contemporary crises in American politics (Mann & Ornstein 2012, 140-143).<sup>126</sup> William

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between conceptions of popular sovereignty in the United States and India "can perhaps best be read in ongoing differences in election law—and in processes of voting" (Gilmartin 2012, 420).

<sup>125</sup> Hasen discusses compulsory voting at the federal level, which he indicates would likely be constitutional, at least insofar as the First Amendment (see *supra* n. 39). The broader question of the constitutionality of compulsory voting enforced at the federal level through fines for unexcused abstention is a complex question beyond the current scope. Presumably there could be strong legal arguments on both sides of this issue, particularly if the 2012 decision on the "individual mandate" associated with the Affordable Care Act offers any insight (*National Federation v. Sebelius*, 567 U.S. \_\_\_\_ (2012)). The possibility of compulsory voting at the state or local level is discussed below.

<sup>126</sup> Mann and Ornstein argue generally that compulsory voting could reduce political polarization by expanding the centrist base of the electorate and minimizing the need for voter mobilization efforts. On this point, see Malkopoulou's argument—based on an insightful historical study of compulsory voting in Europe—that "political moderation is perhaps the most important effect of compulsory voting" (Malkopoulou 2015, 34). However, Malkopoulou also concludes that compulsory voting "is not very compatible" with a majoritarian electoral system like that of the United States, but rather proportional representation may be necessary "to render any application of compulsory voting meaningful" (172-173). Mann and Ornstein argue for mandatory voting in all federal elections—general and primary, which they admit seems unlikely at present, but they say that could change "after another lengthy period of dominance by political extremes and the divisive discourse, agenda, and outcomes that follow" (Mann and Ornstein 2012, 142). They also argue for other administrative reforms aimed at "expanding the vote" (133-140).

Galston of the Brookings Institution has also been a vocal supporter of this type of reform (Galston 2010, 7; 2011; 2014). In fact, President Obama advanced the possibility of compulsory voting at a town hall meeting, reportedly stating, “If everybody voted it would completely change the political map in this country” (O’Donnell and Arkin 2015).<sup>127</sup> Legal scholars have perhaps been somewhat more reticent about making voting an enforceable obligation, although Nicholas Stephanopoulos has prominently advocated for compulsory voting with fines for unexcused abstention, suggesting that it could actually have a chance of being enacted if it began first at local levels of government (Stephanopoulos 2015; see also Tokaji 2008, 505).<sup>128</sup> So perhaps Hasen’s pessimistic assessment of the possibility of compulsory voting in the United States might actually be somewhat less true today?

Nevertheless, it may be that the Australian model of administrative fines for abstention really is not appropriate for the United States, if only due to the particular sensibilities of American political culture, and institutional path dependence (Hasen 1996, 2177).<sup>129</sup> In fact, while proponents of compulsory voting have focused attention on dispelling the notion that actual *voting* is really required, insisting that in practice only *turnout* is compulsory, the deeper problem perhaps relates to the *compulsory* part of the term, not the *voting* part. For it is the literal prospect of the government *compelling* or

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<sup>127</sup> Obama was also quoted as saying that compulsory voting as practiced in Australia could help “counteract” problems of money in politics. The White House press secretary later reportedly clarified that the President “was not making a specific policy prescription” (Boyer 2015).

<sup>128</sup> Stephanopoulos does not address the additional informational problems with voting at local levels (see *supra* n. 104), but he points out that locally implemented compulsory voting would lead to voting in higher order races if local elections are held concurrently with federal elections. Tokaji suggests that compulsory voting should start with experimentation at the state level, as does Galston (2010, 7).

<sup>129</sup> Hasen identifies the main objection to compulsory voting as coming from the American tradition of libertarianism (2176). He writes, “Although the government tells people what to do all the time—file an income tax return, serve on a jury, register in the Selective Service Program, separate trash—hackles rise when compulsory voting is mentioned. I have no good explanation for this phenomenon, especially in a compulsory voting system allowing for abstention” (2176, footnotes deleted).

*coercing* participation that seems to draw the most ire of opponents of the duty to vote, and this is probably what most threatens to offend American sensibilities. However, even in Australia, the system can accurately be described—more accurately perhaps, at least in strictly economic terms—simply as the government *incentivizing* voting in a manner that happens to be through negative monetary sanction, or fine.<sup>130</sup> Additionally, as discussed above in Section 3, what is generally referred to as compulsory voting encompasses many different methods of institutionalizing a civic duty to vote, with varying types of positive or negative sanctions, as well as different levels of administrative enforcement. In the American context, policy analysts and advocates might do best first to focus attention on the normative argument for voting as a civic duty, as opposed to a purely voluntary act, and perhaps on introducing this argument into efforts aimed at a constitutional amendment on voting. Then, when it comes to the question of implementing and enforcing this duty, discussion could focus on *enabling* and *encouraging* participation, which presents a more acceptable frame for American sensibilities, though still controversial enough (see Parker 1993, 572).<sup>131</sup>

The idea of “nudging” citizens to vote could likewise be useful (Elliot 2017).<sup>132</sup>

Pamela Karlan has suggested the government might provide some form of financial

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<sup>130</sup> Opponents of compulsory voting might insist on adding that the negative monetary sanction is enforced through the coercive power of the state, but this is generally implicit in any government fine.

<sup>131</sup> Parker promotes what he calls a “Populist sensibility” in American constitutional theory, which looks favorably on the exertion of “political energy” by “ordinary people,” and which is opposed by a more dominant “Anti-Populist” sensibility. When it comes to the implications of this approach, Parker writes, “To favor the exertion of political energy isn’t to require it. Those who don’t participate in political life should not be penalized, since compelled behavior is not exactly a release of energy. Neither, however, should they be insulated in their privacy, protected from exposure to politics. Rather, they should be both *enabled* and *encouraged* to take some part” (Parker 1993, 572). Parker is not discussing voting in particular, but he continues by stating that the “central mission” of this approach should be “to promote majority rule” (573). When he later mentions voting—among other forms of political participation—he suggests a concern for whether rights of participation are “*actually being exercised*” (576).

<sup>132</sup> Elliot frames compulsory voting—or as he prefers it, “mandatory turnout”—as a precommitment mechanism for those who already have some motivation to vote, and as a nudge for those who would not otherwise participate. Thaler and Sunstein define a nudge as “any aspect of the choice architecture that



compensation for voting in order to boost turnout, comparing this to compensation provided for jury service (Karlan 1994, 1472; see also Saunders 2009).<sup>133</sup> The obvious objection is that payments for turnout risk a “commodification” of the franchise, which raises familiar anxieties about citizens voting for the wrong reasons (Hasen 2000, 1358).<sup>134</sup> Hasen thus expresses a general preference for “sticks over carrots” in increasing turnout, and he suggests that paying citizens for participation might actually be counterproductive to instilling the norm of voting as a civic duty (Hasen 1996, 2172; see also Macmullen 2014, 74).<sup>135</sup> Karlan acknowledges the “commodification objection” and admits there may be a risk of “devaluing voting by paying for it”, but she considers the value of high turnout to outweigh that risk (Karlan 1994, 1473). More importantly

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alters people’s behavior in a predictable way without forbidding any options *or significantly changing their economic incentives*” (Thaler and Sunstein 2008, 6, emphasis added). Admittedly, encouraging turnout through implementation of a duty to vote might require a change in economic incentives, as reflected in the voting calculus, although it seems unclear to what extent such a change would be considered “significant.” Elliot in fact frames mandatory voting as a nudge simply to pay attention to politics, rather than to actually vote (Elliot 2017, 665)

<sup>133</sup> As mentioned previously (see *supra* Section 4), Karlan believes that the right to vote must include a right to abstain, and she thus opposes a duty to vote on First Amendment grounds. This might explain why she suggests a positive incentive for voting, rather than a negative one; however, she also notes, without further discussion, that compulsory voting as practiced in Australia is “the functional equivalent” of her suggestion (Karlan 1994, 1472, n. 54). Saunders argues that a policy of payment for voting can increase turnout “without threatening individual liberty” in the manner of compulsory voting (Saunders 2009, 130).

<sup>134</sup> Hasen argues that “turnout buying” raises normative concerns similar to “core vote buying”—or payments for voting a certain way—in that both compromise the principle of the inalienability of votes (1358), which has the “purpose of promoting public-regarding voting” (1336). Hasen admits this may be less of a concern with payments for turnout, but he states that “the equation of incentives for voting could still have a ‘corrosive effect’ on politics” (1358). Notably perhaps, he focuses mainly on targeted campaign efforts to raise turnout in certain areas, of which he cites examples in California, and he thus indicates that laws allowing payments for turnout are subject to “partisan manipulation” (1355). However, he does not seem to address directly whether a general policy of compensation for voting administered by the government would be subject to the same concerns. Hasen also indicates that payments for turnout are illegal in federal elections, although some states do allow the practice (see Hasen 2000, 1326).

<sup>135</sup> Hasen states that a compulsory voting law “suggests moral authority or social consensus,” while a positive incentive for voting “inspires an outcome-oriented calculus.” MacMullen indicates more generally that positive incentives “may increase the quantity of civic action at grave cost to its quality.” But see Malkopoulou (2015, 54), indicating that Aristotle himself favored payments for participation in the ancient Greek assembly over fines, which he believed were unfair to poor citizens. Plato, according to Maklopoulou, was opposed to both payments and fines, indicating that participation should be instrumentally motivated by “fear of bad governance” (id.).

perhaps, Karlan suggests that there could be creative ways of designing positive incentives in ways aimed at increasing the “sense of political efficacy” and fostering additional civic participation, such as a policy of providing voters with vouchers for donation to non-profit organizations.<sup>136</sup>

Framing any positive incentive for turnout as a policy intended to *offset the costs* of voting could also be useful in this regard.<sup>137</sup> One idea for implementing a positive incentive that would fit with this type of framing might be a voter’s tax credit or other tax subsidy, something a few policy scholars have suggested (Hicks 2002; Mann & Ornstein 2012, 142-143).<sup>138</sup> Notably, this option might be less susceptible to the general critique that paying everyone who turns out is less economically efficient than selectively imposing fines on abstainers (Feely 1974, 241; Hasen 1996, 2172). A positive incentive in the form of a tax credit could be made more economically efficient, particularly if it were enacted as part of a larger tax reform and implemented in a revenue neutral manner (see e.g. Brunk 1980, 561).<sup>139</sup> Tax incentives could also be targeted toward low-income demographics with the worst turnout rates (Hicks 2002, 67), such as by making any tax credit for voting refundable, similar to the Earned Income Tax Credit (see IRS 2017). Another option some have suggested would be to enter all voters into some form of

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<sup>136</sup> Karlan likens her proposal of “vouchers for voting” to policies that have been suggested (and recently implemented in the city of Seattle) for campaign finance vouchers (Karlan 1994, 1473, n. 58).

<sup>137</sup> Indeed, Hasen notes that although payments for turnout are illegal under federal law, it is apparently legal to provide compensation aimed at directly reducing substantive voting costs, such as a payment of free gasoline to cover transportation to the polls, which is permissible according to a federal case Hasen cites (Hasen 2000, 1358, n. 185, citing *Dansereau v. Ulmer*, 903 P. 2d 55 (Alaska 1995)).

<sup>138</sup> Hicks advocates a tax credit for voters in Canadian elections. Mann and Ornstein mention this idea only briefly, attributing it to former Republican congressman Mickey Edwards.

<sup>139</sup> Brunk suggests simply raising taxes by a certain amount and then refunding it to those who participate in the election; however, there obviously could be more complex ways of providing and paying for any tax incentive for voting.

lottery (see Karlan 1994, 1472, n. 54; Mann and Ornstein 2012, 143).<sup>140</sup> However, such a turnout lottery would arguably detract from an emphasis on electoral participation as an act of individual agency in which all citizens share equally.<sup>141</sup> In the end, it would probably be best to allow for experimentation at state and local levels with different policies of positive or negative incentives for turnout, perhaps even used in combination with each other.<sup>142</sup>

Finally, any implementation or enforcement of the duty to vote could also have significant implications for the mobilization efforts of political campaigns. In fact, where compulsory voting is strongly enforced there should essentially be no need to “get out the vote,” and campaigns might instead focus more of their energy and resources on *message* rather than mobilization (Karp et al. 2007, 96).<sup>143</sup> Interestingly, the issues raised by mobilization efforts seem to cut against the most common argument made by opponents of compulsory voting; namely, that leaving voting voluntary improves the epistemic or

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<sup>140</sup> Hasen cites a Mississippi Supreme Court case upholding a turnout lottery run by a political candidate (see Hasen 2000, 1326, n. 11, citing *Naron v. Prestage*, 469 So. 2d 83 (Miss. 1985)). See also Panagopoulos (2012, 266), describing a failed 2006 Arizona ballot initiative that would have established a state-sponsored (revenue-neutral) lottery awarding a million dollars to one lucky voter in every even-year general election.

<sup>141</sup> Furthermore, the miniscule chance of winning a lottery seems to echo the so-called paradox of voting and the supposedly negligible probability of casting an instrumentally useful vote in a large election (see e.g. Gelman et al. 2012, 324). Mann and Ornstein indicate that rather than entering voters into a lottery, they “prefer a change that strengthens the civic fabric of society, one with responsibilities and opportunities for citizens” (Mann and Ornstein 2012, 143).

<sup>142</sup> For empirical evidence on the turnout effects of varying monetary incentives, see Panagopoulos (2012). Based on field experiments in actual elections, Panagopoulos estimates that compensation of about \$40 would increase turnout by an average of about 6 percentage points, while \$100 could increase turnout as much as 15 points (277-278). He indicates that incentives in the \$40-50 range have about the same turnout effect observed in studies of social pressure, including door-to-door canvassing (278).

<sup>143</sup> Karp et al. do find evidence of increased mobilization efforts in marginal districts in Australia, demonstrating that even with strongly enforced compulsory voting, mobilization can still be somewhat important, particularly in close elections. They also fail to find strong evidence of campaigns in Australia focusing on voters who report weaker party identification, which would indicate “conversion” strategies focused more on message (102-103). However, the tendency to emphasize message over mobilization could be more subtle, as Karp et al. acknowledge in their hypothesis that campaign efforts in Australia are “likely to be *flavored* by attempts at conversion rather than mobilization” (96, emphasis added). A more intensive case study of Australian electoral campaigns would be useful for better evaluating this hypothesis.

deliberative quality of the decision. Indeed, most would probably agree that the resources and efficacy of campaigns in mobilizing supporters should not necessarily be allowed to determine the winner of an election, as there is no reason to assume that candidates with more skilled and well-funded ground campaigns are normatively better in any way. Furthermore, voluntary voting also leaves much more room for political parties and campaigns to pursue strategies of “demobilization” of likely opponents in efforts that may undermine norms of participatory equality (see Piven et al. 2009).<sup>144</sup> Even without active demobilization strategies, the get-out-the-vote efforts that are necessary under voluntary voting can actually exacerbate inequality in turnout, since campaigns largely target individuals from already over-represented demographics (Enos et al. 2014). Thus, an additional policy argument for implementing and enforcing a civic duty to vote is that it could minimize the ability of political campaigns to influence election outcomes in ways that infringe on principles of equal participation and democratic justice.

## 6) CONCLUSION

This chapter’s argument for the civic duty to vote as an important non-instrumental motivation for voting, represented by the *D* term of the voting calculus, has relied and built upon the arguments of previous chapters. Chapter 1 demonstrated that voting can be instrumentally rational and causally efficacious, while Chapter 2 showed that the instrumental benefits of voting may be perceived to be substantial. Chapter 3 then explained how the informational costs of voting are not necessarily prohibitive for the average citizen, proceeding to outline a normative argument for election laws and

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<sup>144</sup> Lijphart also indicates that campaigns under compulsory voting could feature less negative advertising, which is thought to work by demobilizing opponents (Lijphart 1997, 10, citing Ansolabehere & Iyengar 1995; but see Krupnikov 2011).

policies aimed at minimizing substantive costs. With this chapter, the foundations for a coherent and cohesive argument for a civic duty to vote are now complete, and the overall conclusion is as follows: The duty to vote provides an ethically meaningful and rationally coherent normative foundation for broadly participatory theory and practice under modern conditions of liberal democracy. Some implications of this argument for U.S. election law and policy are that a civic duty to vote should be considered for inclusion in efforts for a Constitutional amendment on voting rights, and some form of implementation and enforcement of this duty could be designed in a manner appropriate to political and cultural norms for this country.

An institutionalized addition to the *D* term of the calculus through a constitutional duty to vote is probably only needed where turnout is low, as in the U.S., for if turnout is high, citizens either already recognize the duty as a social norm, or they may have strong instrumental motivations for participating due to the structure of the political system (see Hill 119-120; Hirczy 1995). At the risk of further belaboring readers of this already long chapter, some final comments on the dangers of low turnout may be useful: Rates of turnout are related to an important concern for democratic legitimacy, specifically the confidence that may or may not be justified in the belief that political outcomes—or more specifically, choices of political leadership—are “true” expressions of popular sovereignty, in the sense of accurately reflecting the majority preference of the eligible voting citizenry. This is crucial, because if it were believed that the choice of leadership—and hence political outcomes—might have been different had more citizens voted, it could decrease democratic legitimacy, both empirically and normatively. The force of this point is revealed in the extensive efforts of political scientists to prove as conclusively as possible that the political preferences of American nonvoters are in fact

reasonably close to those of voters, at least in recent history.<sup>145</sup> Yet from a constitutional design perspective, and from the perspective of the Rawlsian original position, if one is truly concerned with minimizing the possibility of a deviation from the “true” democratic outcome, and knowing with more than just a certain statistical confidence that outcomes are legitimate, electoral institutions can and should be structured toward this goal. Instead, there seems to be more concern among democratic theorists with ensuring some sort of substantive epistemic quality in the voting decision, which many believe would actually diminish with higher turnout.

Furthermore, if there were a deviation in popular sovereignty such that the “true” majority’s preferences were contravened, it might not actually be observable in political outcomes. It is possible that a totalitarian dictator could win a democratic election due to low turnout, but more likely the winner would be just another liberal democratic party. The winner would then take the country in a different direction—not necessarily making it substantively less democratic, or moving it to the political left or right—or consistently in any particular direction—but rather just to a *different place* than it would otherwise have gone. Perhaps this helps explain why studies of compulsory voting’s effects have not turned up much conclusive evidence beyond the increase in turnout. More fundamentally, these studies may be misguided to the extent they seek out substantive effects as a means for either defending or criticizing compulsory voting normatively. What arguably makes Australia more democratically legitimate than the U.S. could have nothing to do with the substance of political outcomes in either country, but rather with the fact that in Australia there can be greater confidence that the choice of leadership is an expression of popular sovereignty reflected through the will of the majority. In the

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<sup>145</sup> See Chapter 3, Section 2.

U.S., by contrast, one is always somewhat unsure on this point, and so statistical studies are needed to convince. In fact, there may be reasons to believe that many elections in this country would turn out differently if turnout were generally higher. Indeed, the country as a whole might look very different today—and could look very different in the future—if more citizens participated in elections.

Yet the larger argument for a civic duty to vote reaches beyond these outcome-oriented concerns. As discussed in Section 2 above, conceptions of duty can transcend considerations of instrumental aims and even ideas of rational choice, as reflected in a Kantian approach to ethical behavior. The duty to vote has a natural affinity to the notion of religious duty, and voting from a sense of obligation may thus be valued as participation in a shared public ritual that contributes to republican ideals of civic virtue and a communitarian “civil religion” (Bellah 1967).<sup>146</sup> It may thus be understandable that Lomasky and Brennan choose to evoke Marx’s well-known denigration of religion; however, just as Marx was arguably wrong in thinking that the sociological phenomenon of religious belief was an irrational delusion that would eventually die out, so may Lomasky and Brennan be wrong about the duty to vote. Rather than the opiate of democratic masses, the duty to vote may be a vital staple of a healthy democratic diet.

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<sup>146</sup> Indeed, Bellah states that “democratic communitarianism is committed to the idea of participation as both a right and a duty” (Bellah 1995, 54), although as discussed in Chapter 2 (Section 2), he and other scholars in these schools of theory appear to attach little value to voting as a form of democratic participation.

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